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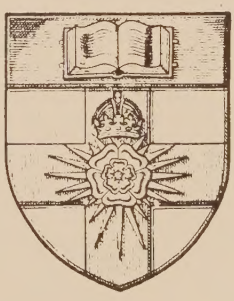

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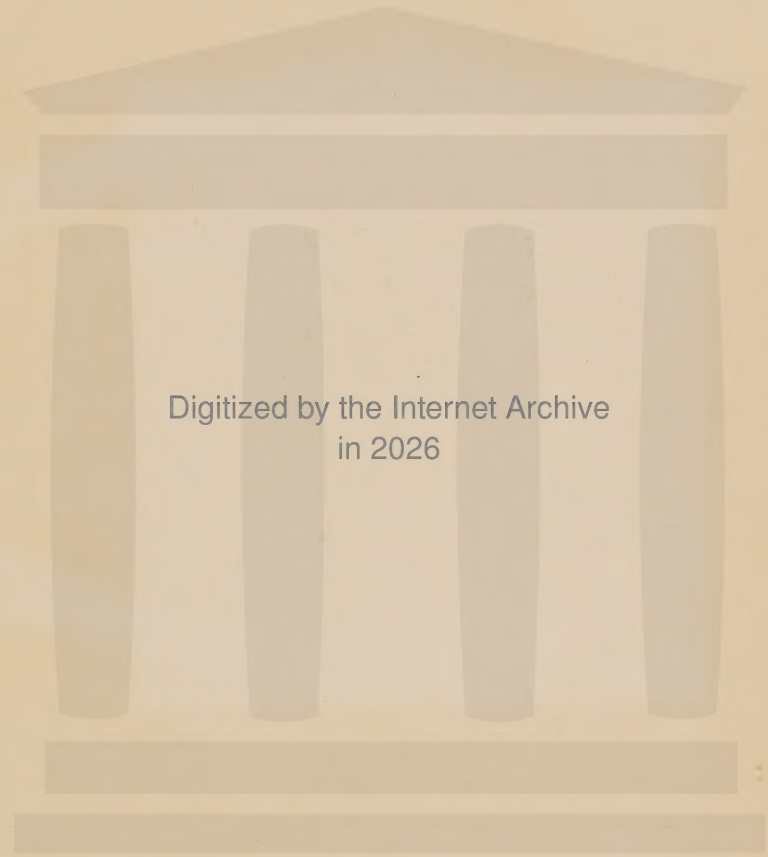
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THE

LAW REPORTS.

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Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

EDITOR OF HOUSE OF LORDS REPORTS—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

House of Lords—English and Irish Appeals and Peerages.	J. M. MOORSOM, Q.C.	
House of Lords—Scotch and Divorce Appeals and Scotch Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals . .	HERBERT COWELL,	*Barrister-at-Law.*

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1887
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JUDGES AND LAW OFFICERS

From **NOVEMBER** 2nd 1865, to
OCTOBER 24th, 1887.

COMPILED BY

SIR G. SHERSTON BAKER, BART.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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STAMFORD STREET AND CHARING CROSS.

JUDGES AND LAW OFFICERS.

THE want having been felt of some memoranda of the changes which have taken place among the Judges and Law Officers, and of the new appointments which have been made, the COUNCIL OF LAW REPORTING has caused the following list to be compiled.

It contains the names of all the Judges of the Superior Courts and Law Officers of the Crown who have held office or have been appointed from the commencement of the publication of the LAW REPORTS (November 2nd, 1865) to the Michaelmas Sittings (October 24th, 1887).

It is proposed in future to continue these memoranda year by year.

THE LORD CHANCELLORS.

THE RIGHT HONOURABLE LORD CRANWORTH (SIR ROBERT MONSEY ROLFE). *First returned to Parliament in* 1832 *for Penryn; K.C.,* 1832; *Solicitor-General,* 1834, *and again in* 1835; *created Serjeant, and appointed a Baron of the Court of Exchequer,* 1839; *Vice-Chancellor,* 1850; *Lord Justice,* 1851; *Lord Chancellor,* 1852 *to* 1858; *and again in* 1865 (*July* 7), *in the place of* LORD WESTBURY.* *Resigned in* 1866. *Died on July* 26, 1868.

THE RT. HON. LORD CHELMSFORD (SIR FREDERIC THESIGER). *K.C.,* 1834; *first returned to Parliament in* 1840 *for Woodstock; Solicitor-General,* 1844; *Attorney-General,* 1845 *to* 1846; *and again in* 1852; *Lord Chancellor,* 1858 *to* 1859; *and again in* 1866 (*July* 6), *in the place of* LORD CRANWORTH. *Resigned in* 1868. *Died on Oct.* 5, 1878.

THE RT. HON. EARL CAIRNS (SIR HUGH M'CALMONT CAIRNS). *First returned to Parliament in* 1852, *for Belfast; Q.C.,* 1856; *Solicitor-General,* 1858 *to* 1859; *Attorney-General,* 1866 (*July* 10), *in the place of* SIR ROUNDELL PALMER; *Lord Justice,* 1866 (*Oct.* 31), *in the place*

* With the exception of Lord Westbury, the names of the predecessors of Judges are alone given who were in office on Nov. 2nd, 1865, or who were appointed subsequently to that date.

of Sir J. L. Knight-Bruce; *Lord Chancellor,* 1868 (*Feb.* 29), *in the place of* Lord Chelmsford; *and again in* 1874 (*Feb.* 21), *in the place of* Lord Selborne. *Resigned in* 1880. *Died on April* 2, 1885.

The Rt. Hon. Lord Hatherley (Sir William Page-Wood). *Q.C.,* 1845; *first returned to Parliament in* 1847, *for Oxford; Solicitor-General,* 1851; *Vice-Chancellor,* 1853 (*Jan.* 10); *Lord Justice,* 1868 (*March* 6), *in the place of* Lord Cairns; *Lord Chancellor,* 1868 (*Dec.* 9), *in the place of* Lord Cairns. *Resigned in* 1872. *Died on July* 10, 1881.

The Rt. Hon. Earl of Selborne (Sir Roundell Palmer). *First returned to Parliament in* 1847, *for Plymouth; Q.C.,* 1849; *Solicitor-General,* 1861; *Attorney-General,* 1863 (*Oct.* 3); *Lord Chancellor,* 1872 (*Oct.* 15), *in the place of* Lord Hatherley; *and again in* 1880 (*April* 28), *in place of* Lord Cairns. *Resigned in* 1885.

The Rt. Hon. Lord Halsbury (Sir Hardinge Stanley Giffard). *Q.C.,* 1865; *Solicitor-General,* 1875 (*Nov.* 25), *in the place of* Sir John Holker; *first returned to Parliament in* 1877 *for Launceston; Lord Chancellor,* 1885 (*June* 24), *in the place of* Lord Selborne; *and again in* 1886 (*Aug.* 3), *in the place of* Lord Herschell.

The Rt. Hon. Lord Herschell (Sir Farrer Herschell). *Q.C.,* 1872; *first returned to Parliament in* 1874, *for the city of Durham; Solicitor-General,* 1880 (*May* 3), *in the place of* Sir Hardinge Stanley Giffard; *Lord Chancellor,* 1886 (*Feb.* 6), *in the place of* Lord Halsbury. *Resigned in* 1886.

THE LORDS OF APPEAL IN ORDINARY.

The Right Honourable Lord Blackburn (Sir Colin Blackburn). *Created Serjeant, and appointed a Justice of the Court of Queen's Bench,* 1859 (*June* 28); *appointed in* 1876 (*Oct.* 16), *a Lord of Appeal in Ordinary, in pursuance of* 39 & 40 *Vict. c.* 59, *s.* 6. *Resigned in* 1887.

The Rt. Hon. Lord Gordon (Edward Strathearn Gordon). *Q.C.,* 1868; *Solicitor-General for Scotland,* 1866; *first returned to Parliament in* 1867 *for Thetford; Lord Advocate,* 1867, *and again in* 1874; *appointed in* 1876 (*Oct.* 17), *a Lord of Appeal in Ordinary, in pursuance of* 39 & 40 *Vict. c.* 59, *s.* 6. *Died on Aug.* 21, 1879.

The Rt. Hon. Lord Watson (William Watson). *Solicitor-General for Scotland* 1874; *Lord Advocate,* 1876; *first returned to Parliament in* 1876 *for Glasgow and Aberdeen Universities; appointed in* 1880 (*April* 28) *a Lord of Appeal in Ordinary in the place of* Lord Gordon.

The Rt. Hon. Lord FitzGerald (John David FitzGerald). *Q.C.,* 1847; *first returned to Parliament in* 1852 *for Ennis; Solicitor-General for Ireland,* 1855; *Attorney-General for Ireland,* 1856 *and again in* 1859; *Judge of the Court of Queen's Bench, Ireland,* 1860; *appointed in* 1882 (*June* 23) *a Lord of Appeal in Ordinary, in pursuance of* 39 & 40 *Vict. c.* 59, *s.* 14.

The Rt. Hon. Lord Macnaghten (Edward Macnaghten). *Q.C.*, 1880; *first returned to Parliament in* 1880 *for Co. Antrim*; *appointed in* 1887 (*Jan.* 25), *a Lord of Appeal in Ordinary in the place of* Lord Blackburn.

THE MASTERS OF THE ROLLS.

[By virtue of 44 & 45 Vict. c. 68, s. 2 (Aug. 27, 1881), a Master of the Rolls is not a Judge of the High Court of Justice, but is a Judge of the Court of Appeal.]

The Right Honourable Lord Romilly (Sir John Romilly). *Q.C.*, 1843; *first returned to Parliament in* 1832 *for Bridport*; *Solicitor-General*, 1848; *Attorney-General*, 1850; *Master of the Rolls*, 1851 (*March* 28); *raised to Peerage in* 1865. *Resigned in* 1873. *Died on Dec.* 23, 1874.

The Rt. Hon. Sir George Jessel. *Q.C.*, 1865; *first returned to Parliament in* 1868 *for Dover*; *Solicitor-General*, 1871 (*Nov.* 10), *in the place of* Sir John Duke Coleridge; *Master of the Rolls*, 1873 (*Aug.* 30), *in the place of* Lord Romilly. *Died on March* 21, 1883.

The Rt. Hon. Lord Esher (Sir William Baliol Brett). *Q.C.*, 1860; *first returned to Parliament in* 1866 *for Helston*; *Solicitor-General*, 1868 (*Feb.* 10), *in the place of* Sir Charles Jasper Selwyn; *created Serjeant and appointed in* 1868 (*Aug.* 24), *a Justice of the Court of Common Pleas, in pursuance of* 31 & 32 *Vict. c.* 125, *s.* 11, *sub-s.* 8; *a Justice of Appeal in* 1876 (*Oct.* 27), *in pursuance of* 39 & 40 *Vict. c.* 59, *s.* 15, *taking the title of Lord Justice of Appeal in* 1877, *by virtue of* 40 & 41 *Vict. c.* 9, *s.* 4; *Master of the Rolls*, 1883 (*April* 3), *in the place of* Sir George Jessel.

THE LORDS JUSTICES OF APPEAL.

[These Judges were "Lords Justices" until 1875, when by 38 & 39 Vict. c. 77, s. 4, their office was extended and their name was changed to "Justices of Appeal." This title was abolished in 1877, and the present title was substituted by 40 & 41 Vict. c. 9, s. 4. The Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate Division are *ex officio* Judges of this Court.]

The Right Honourable Sir James Lewis Knight-Bruce. *K.C.*, 1829; *first returned to Parliament in* 1831 *for Bishop's Castle*; *Vice-Chancellor*, 1841; *Lord Justice*, 1851 (*Oct.* 14). *Resigned in* 1866. *Died on Nov.* 7, 1866.

The Rt. Hon. Sir George James Turner. *Q.C.*, 1840; *first returned to Parliament in* 1847 *for Coventry*; *Vice-Chancellor*, 1851; *Lord Justice*, 1853 (*Jan.* 10). *Died on July* 9, 1867.

THE RT. HON. SIR HUGH M'CALMONT CAIRNS. *See* The Lord Chancellors.

THE RT. HON. SIR JOHN ROLT. *Q.C.*, 1846; *first returned to Parliament in* 1857 *for the Western Division of Gloucestershire*; *Attorney-General*, 1866 (*Oct.* 29), *in the place of* SIR H. M. CAIRNS; *Lord Justice*, 1867 (*July* 18), *in the place of* SIR GEORGE J. TURNER. *Resigned in* 1868. *Died on June* 6, 1871.

THE RT. HON. SIR CHARLES JASPER SELWYN. *Q.C.*, 1856; *first returned to Parliament in* 1859 *for Cambridge University*; *Solicitor-General*, 1867 (*July* 18), *in the place of* SIR JOHN BURGESS KARSLAKE; *Lord Justice*, 1868 (*Feb.* 8), *in the place of* SIR JOHN ROLT. *Died on August* 11, 1869.

THE RT. HON. SIR WILLIAM PAGE WOOD. *See* The Lord Chancellors.

THE RT. HON. SIR GEORGE MARKHAM GIFFARD. *Q.C.*, 1859; *Vice-Chancellor in* 1868 (*March* 12), *in the place of* SIR WILLIAM PAGE WOOD; *Lord Justice in* 1869 (*Jan.* 11), *in the place of* LORD HATHERLEY. *Died on July* 13, 1870.

THE RT. HON. SIR WILLIAM MILBOURNE JAMES. *Q.C.*, 1853; *Vice-Chancellor in* 1869 (*Jan.* 11), *in the place of* SIR GEORGE MARKHAM GIFFARD; *Lord Justice in* 1870 (*July* 4), *in the place of* SIR CHARLES JASPER SELWYN. *Died on June* 7, 1881.

THE RT. HON. SIR GEORGE MELLISH. *Q.C.*, 1861; *Lord Justice in* 1870 (*Aug.* 4), *in the place of* SIR GEORGE MARKHAM GIFFARD. *Died on June* 16, 1877.

THE RT. HON. SIR RICHARD BAGGALLAY. *Q.C.*, 1861; *first returned to Parliament in* 1865 *for Hereford*; *Solicitor-General*, 1868 (*Sept.* 14), *in the place of* SIR W. B. BRETT; *Solicitor-General in* 1874 (*Feb.* 27), *in the place of* SIR WILLIAM G. G. V. VERNON HARCOURT; *Attorney-General in* 1874 (*April* 20), *in the place of* SIR JOHN BURGESS KARSLAKE; *appointed a Justice of Appeal in* 1875 (*Nov.* 5), *in pursuance of* 38 *&* 39 *Vict. c.* 77, *s.* 4 (*see* head-note). *Resigned in* 1885.

THE RT. HON. LORD BRAMWELL (SIR GEORGE WILLIAM WILSHERE BRAMWELL). *Q.C.*, 1851; *created Serjeant, and appointed a Baron of the Court of Exchequer in* 1856 (*Jan.* 8); *a Justice of Appeal in* 1876 (*Oct.* 27), *in pursuance of* 39 *&* 40 *Vict. c.* 59, *s.* 15 (*see* head-note). *Resigned in* 1881, *and was raised to the Peerage in* 1882.

THE RT. HON. SIR WILLIAM BALIOL BRETT. *See* The Masters of the Rolls.

THE RT. HON. SIR RICHARD PAUL AMPHLETT. *Q.C.*, 1858; *first returned to Parliament in* 1868 *for the Eastern Division of Worcestershire*; *created Serjeant and appointed a Baron of the Court of Exchequer in* 1874 (*Jan.* 23), *in the place of* SIR SAMUEL MARTIN; *a Justice of Appeal in* 1876 (*Oct.* 27), *in pursuance of* 39 *&* 40 *Vict. c.* 59, *s.* 15 (*see* head-note). *Resigned in* 1877. *Died on Dec.* 7, 1883.

The Rt. Hon. Sir Henry Cotton. *Q.C.*, 1866; *a Lord Justice of Appeal in* 1877 (*June* 28), *in the place of* Sir George Mellish.

The Rt. Hon. Alfred Henry Thesiger. *Q.C.*, 1873; *Lord Justice of Appeal in* 1877 (*Nov.* 2), *in the place of* Sir Richard Paul Amphlett. *Died on Oct.* 20, 1880.

The Rt. Hon. Sir Robert Lush. *Q.C.*, 1857; *created Serjeant and appointed a Justice of the Court of Queen's Bench in* 1865 (*Nov.* 2); *a Lord Justice of Appeal in* 1880 (*Nov.* 5), *in the place of* The Right Hon. A. H. Thesiger. *Died on Dec.* 27, 1881.

The Rt. Hon. Sir Nathaniel Lindley. *Q.C.*, 1872, *created Serjeant and appointed a Justice of the Court of Common Pleas in* 1875 (*May* 12), *in the place of* Sir J. W. Huddleston; *a Lord Justice of Appeal in* 1881 (*Nov.* 1), *in the place of* Sir G. W. W. Bramwell.

The Rt. Hon. Sir John Holker. *Q.C.*, 1868; *first returned to Parliament in* 1872 *for Preston*; *Solicitor-General in* 1874 (*April* 20), *in the place of* Sir Richard Baggallay; *Attorney-General in* 1875 (*Nov.* 25), *in the place of* Sir Richard Baggallay; *a Lord Justice of Appeal in* 1882 (*Jan.* 14), *in the place of* Sir Robert Lush. *Died on May* 24, 1882.

The Rt. Hon. Sir Charles Synge Christopher Bowen. *A Justice of the High Court* (*Queen's Bench Division*) *in* 1879 (*June* 16), *in the place of* Sir John Mellor; *a Lord Justice of Appeal in* 1882 (*June* 2) *in the place of* Sir John Holker.

The Rt. Hon. Sir Edward Fry. *Q.C.*, 1869; *a Justice of the High Court* (*Chancery Division*) *in* 1877 (*April* 27) *in pursuance of* 40 *&* 41 *Vict. c.* 9; *Lord Justice of Appeal in* 1883 (*April* 9), *in the place of* Sir William Baliol Brett.

The Rt. Hon. Sir Henry Charles Lopes. *Q.C.*, 1869; *first returned to Parliament in* 1868 *for Launceston*; *a Justice of the High Court* (*Common Pleas Division*) *in* 1876 (*Nov.* 7), *in the place of* Sir Thomas Dickson Archibald; *Lord Justice of Appeal in* 1885 (*Dec.* 1), *in the place of* Sir Richard Baggallay.

JUSTICES OF THE HIGH COURT (CHANCERY DIVISION).

[The ordinary Judges of the Court of Chancery were "Vice-Chancellors," but the Judges appointed to the Chancery Division since November 1st, 1875, were called "Judges of the High Court." By 40 & 41 Vict. c. 9 (April 24, 1877), they are to be styled "Justices of the High Court."]

The Right Honourable Sir Richard Torin Kindersley. *K.C.*, 1835; *Master in Chancery*, 1848; *Vice-Chancellor*, 1851 (*Oct.* 27). *Resigned in* 1866. *Died on Oct.* 22, 1879.

The Rt. Hon. Sir John Stuart. *Q.C.*, 1839; *first returned to Parliament in* 1846 *for Newark*; *Vice-Chancellor*, 1852 (*Sept.* 24). *Resigned in* 1871, *and was named a Privy Councillor. Died on Oct.* 29, 1876.

The Hon. Sir William Page Wood. *See* The Lord Chancellors.

The Rt. Hon. Sir Richard Malins. *Q.C.*, 1849; *first returned to Parliament in* 1852 *for Wallingford*; *Vice-Chancellor in* 1866 (*Dec.* 3), *in the place of* Sir Richard Torin Kindersley. *Resigned in* 1881, *and was named a Privy Councillor the same year. Died on Jan.* 15, 1882.

The Hon. Sir George Markham Giffard. *See* Lords Justices of Appeal.

The Hon. Sir William Milbourne James. *See* Lords Justices of Appeal.

The Rt. Hon. Sir James Bacon. *Q.C.*, 1846; *Chief Judge in Bankruptcy*, 1869–1884; *Vice-Chancellor* (*retaining the former appointment*) *in* 1870 (*July* 4), *in the place of* Sir William Milbourne James. *Resigned in* 1886, *and was named a Privy Councillor the same year.*

The Hon. Sir John Wickens, *Vice-Chancellor in* 1871 (*April* 18), *in the place of* Sir John Stuart. *Died on Oct.* 23, 1873.

The Hon. Sir Charles Hall. *Vice-Chancellor in* 1873 (*Nov.* 11), *in the place of* Sir John Wickens. Sir Charles Hall *was the last Judge appointed a Vice-Chancellor. Resigned in* 1882. *Died on Dec.* 12, 1883.

The Hon. Sir Edward Fry. *See* Lords Justices of Appeal.

The Hon. Sir Edward Ebenezer Kay. *Q.C.*, 1866; *Justice of the High Court* (*Chancery Division*) *in* 1881 (*March* 30), *in the place of* Sir Richard Malins.

The Hon. Sir Joseph William Chitty. *Q.C.*, 1874; *first returned to Parliament in* 1880 *for Oxford*; *appointed a Justice of the High Court* (*Chancery Division*), *in* 1881 (*Sept.* 6), *in pursuance of* 44 & 45 *Vict. c.* 68, *s.* 5.

The Hon. Sir John Pearson. *Q.C.*, 1866; *Justice of the High Court* (*Chancery Division*) *in* 1882 (*Oct.* 24), *in the place of* Sir Charles Hall *Died on May* 13, 1886.

The Hon. Sir Ford North. *Q.C.*, 1877; *a Justice of the High Court* (*Queen's Bench Division*) *in* 1881 (*Nov.* 1), *in the place of* Sir Nathaniel Lindley; *transferred to the Chancery Division in* 1883, *in the place of* Sir Edward Fry.

The Hon. Sir James Stirling. *Justice of the High Court* (*Chancery Division*) *in* 1886 (*May* 20), *in the place of* Sir John Pearson.

The Hon. Sir Arthur Kekewich. *Q.C.*, 1877; *a Justice of the High Court* (*Chancery Division*) *in* 1886 (*Nov.* 12), *in the place of* Sir James Bacon.

JUSTICES OF THE HIGH COURT (QUEEN'S BENCH DIVISION).

[The following were Judges of the former Court of Queen's Bench.]

The Lord Chief Justice of England, the Right Hon. Sir Alexander James Edmund Cockburn, Bart. *Q.C.* 1841; *first returned to Parliament in* 1847 *for Southampton; Solicitor-General,* 1850; *Attorney-General,* 1851 *and again in* 1852; *created a Serjeant and appointed Lord Chief Justice of the Court of Common Pleas,* 1856; *Lord Chief Justice of England in* 1859 (*June* 24). *Died on Nov.* 20, 1880.

Sir Colin Blackburn. *See* The Lords of Appeal in Ordinary.

The Rt. Hon. Sir John Mellor. *Q.C.,* 1851; *first returned to Parliament in* 1857 *for Yarmouth; created Serjeant and appointed a Justice of the Court of Queen's Bench in* 1861 (*Dec.* 3). *Resigned in* 1879, *and was named a Privy Councillor. Died on April* 26, 1887.

The Hon. Sir William Shee. *Serjeant,* 1840; *Queen's Serjeant,* 1857; *first returned to Parliament in* 1852 *for Kilkenny; a Justice of the Court of Queen's Bench in* 1863 (*Dec.* 19). *Died on Feb.* 19, 1868.

Sir Robert Lush. *See* Lords Justices of Appeal.

Sir James Hannen. *See* Probate, Divorce and Admiralty Division.

The Hon. Sir George Hayes. *Serjeant,* 1856; *Q.C.,* 1861; *appointed in* 1868 (*Aug.* 25) *a Justice of the Court of Queen's Bench, in pursuance of* 31 *&* 32 *Vict. c.* 125, *s.* 11, *sub-s.* 8. *Died on Nov.* 19, 1869.

The Hon. Sir John Richard Quain. *Q.C.,* 1866; *created Serjeant and appointed a Justice of the Court of Queen's Bench in* 1872 (*Jan.* 5), *in the place of* Sir George Hayes. *Died on Sept.* 12, 1876.

Sir Thomas Dickson Archibald. *See* Common Pleas Division.

The Hon. Sir William Ventris Field. *Q.C.,* 1864; *created Serjeant and appointed a Justice of the Court of Queen's Bench in* 1875 (*Feb.* 6), *in the place of* Sir Thomas Dickson Archibald, *transferred to the Court of Common Pleas.*

[On the 1st November, 1875, by virtue of 36 & 37 Vict. c. 66, s. 5, the then Judges of the Court of Queen's Bench became Judges of the High Court of Justice. They were attached to the Queen's Bench Division. By 40 & 41 Vict. c. 9 (April 24, 1877) they are, with the exception of the President of the Division, to be styled "Justices of the High Court."]

The Hon. Sir Henry Manisty. *Q.C.,* 1857; *a Justice of the High Court (Queen's Bench Division),* 1876 (*Oct.* 31), *in the place of* Sir John Richard Quain.

The Hon. Sir Henry Hawkins. *See* Exchequer Division.

The Hon. Sir Charles Synge Christopher Bowen. *See* Lords Justices of Appeal.

The Hon. Sir Charles James Watkin Williams. *Q.C.,* 1873; *first returned to Parliament in* 1868 *for Denbigh: a Justice of the High*

Court (Queen's Bench Division) in 1880 (*Nov.* 5), *in the place of* Sir Robert Lush. *Died on July* 17, 1884.

The Right Hon. Lord Coleridge (Sir John Duke Coleridge). *Q.C.*, 1861; *first returned to Parliament in* 1865 *for Exeter; Solicitor-General,* 1868 (*Dec.* 12), *in the place of* Sir Richard Baggallay; *Attorney-General,* 1871 (*Nov.* 10), *in the place of* Sir Robert Porrett Collier; *created Serjeant and appointed Lord Chief Justice of the Court of Common Pleas in* 1873 (*Nov.* 19), *in the place of* Sir William Bovill; *Lord Chief Justice of England in* 1880 (*Nov.* 29), *in the place of* Sir Alexander J. E. Cockburn, Bart.

[By Order in Council of December 16th, 1880 (*Weekly Notes,* 1881, Part II., p. 55) the number of the Divisions of the High Court was reduced by the consolidation and union of all the Judges attached respectively to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, into one Division, to be called the "Queen's Bench Division," under the Presidency of the Lord Chief Justice of England. The same Order abolished the titles of "Lord Chief Justice of the Common Pleas," and "Lord Chief Baron of the Exchequer."]

The Hon. Sir Henry Mather Jackson, Bart. *Q.C.*, 1873; *first returned to Parliament in* 1867 *for Coventry; a Justice of the High Court (Queen's Bench Division) in* 1881 (*March* 2), *in the place of* Sir J. D. Coleridge. *Died on March* 8, 1881; *was not sworn into office.*

The Hon. Sir James Charles Mathew. *A Justice of the High Court (Queen's Bench Division) in* 1881 (*March* 3), *in the place of* Sir Fitzroy Kelly.

The Hon. Sir Lewis William Cave. *Q.C.*, 1875; *a Justice of the High Court (Queen's Bench Division) in* 1881 (*March* 14) *in the place of* Sir Henry M. Jackson; *also appointed since Dec.,* 1883, *to be the Judge to exercise jurisdiction in Bankruptcy, under the provisions of* 46 & 47 *Vict. c.* 52, *ss.* 93 *and* 94.

The Hon. Sir Ford North. *See* Chancery Division.

The Hon. Sir John Charles Day. *Q.C.*, 1872; *a Justice of the High Court (Queen's Bench Division) in* 1882 (*June* 3), *in the place of* Sir Charles S. C. Bowen.

The Hon. Sir Archibald Levin Smith. *A Justice of the High Court (Queen's Bench Division) in* 1883 (*April* 12), *in the place of* Sir Ford North.

The Hon. Sir Alfred Wills. *Q.C.*, 1872; *a Justice of the High Court (Queen's Bench Division) in* 1884 (*July* 21), *in the place of* Sir C. J. Watkin Williams.

The Hon. Sir William Grantham. *First returned to Parliament in* 1874 *for East Surrey; Q.C.*, 1877; *a Justice of the High Court (Queen's Bench Division) in* 1886 (*Jan.* 4) *in the place of* Sir Henry Charles Lopes.

The Hon. Sir Arthur Charles. *Q.C.*, 1877; *a Justice of the High Court (Queen's Bench Division) in* 1887 (*Sept.* 8) *in the place of* Sir William Robert Grove.

JUSTICES OF THE HIGH COURT (COMMON PLEAS DIVISION).

[The following were Judges of the former Court of Common Pleas.]

THE RIGHT HON. SIR WILLIAM ERLE. *K.C.* 1834; *first returned to Parliament in* 1837 *for Oxford; created Serjeant and appointed a Justice of the Court of Common Pleas in* 1845; *transferred to the Court of Queen's Bench in* 1846; *Lord Chief Justice of the Common Pleas,* 1859 (*June* 24). *Resigned in* 1866. *Died on Jan.* 28, 1880.

THE RT. HON. SIR JAMES SHAW WILLES. *Created Serjeant and appointed a Justice of the Court of Common Pleas in* 1855 (*July* 3); *Privy Councillor,* 1871. *Died on October* 2, 1872.

THE RT. HON. SIR JOHN BARNARD BYLES. *Serjeant,* 1843; *Queen's Serjeant,* 1857; *a Justice of the Common Pleas,* 1858 (*Jan.* 9). *Resigned in* 1873, *and was named a Privy Councillor. Died on Feb.* 3, 1884.

THE RIGHT HON. SIR HENRY SINGER KEATING. *Q.C.,* 1849; *first returned to Parliament in* 1852 *for Reading; Solicitor-General,* 1857–8 *&* 1859; *created Serjeant and appointed a Justice of the Court of Common Pleas,* 1859 (*Dec.* 14). *Resigned in* 1875, *and was named a Privy Councillor.*

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH. *Q.C.* 1852; *first returned to Parliament in* 1859 *for Truro; created Serjeant and appointed a Justice of the Court of Common Pleas in* 1865 (*Feb.* 2). *Resigned in* 1871 *and was appointed to the office of paid Member of the Judicial Committee of the Privy Council by virtue of* 34 *&* 35 *Vict. c.* 91, *which he resigned in* 1881.

THE RIGHT HON. SIR WILLIAM BOVILL. *Q.C.,* 1855; *first returned to Parliament in* 1857 *for Guildford; Solicitor-General in* 1866 (*July* 10) *in the place of* SIR R. P. COLLIER; *created Serjeant and appointed Lord Chief Justice of the Court of Common Pleas in* 1866 (*Nov.* 29) *in the place of* SIR W. ERLE. *Died on Nov.* 1, 1873.

SIR WILLIAM BALIOL BRETT. *See* The Masters of the Rolls.

THE RIGHT HON. LORD MONKSWELL (SIR ROBERT PORRETT COLLIER). *First returned to Parliament in* 1852 *for Plymouth; Q.C.* 1854; *Solicitor-General,* 1863 (*Oct.* 3); *Attorney-General in* 1868 (*Dec.* 12) *in the place of* SIR JOHN KARSLAKE; *created Serjeant and appointed a Justice of the Common Pleas in* 1871 (*Nov.* 7) *in the place of* SIR MONTAGUE EDWARD SMITH. *Resigned on Nov.* 9, 1871, *and was appointed a paid Member of the Judicial Committee of the Privy Council by virtue of* 34 *&* 35 *Vict. c.* 91. *Died on Oct.* 27, 1886.

THE HON. SIR WILLIAM ROBERT GROVE. *Q.C.,* 1853; *created Serjeant and appointed a Justice of the Court of Common Pleas in* 1871 (*Nov.* 30) *in the place of* SIR ROBERT PORRETT COLLIER. *Resigned in* 1887.

THE HON. GEORGE DENMAN. *Q.C.,* 1861; *first returned to Parliament in* 1859 *for Tiverton; created Serjeant and appointed a Justice of the Court of Common Pleas in* 1872 (*Oct.* 17) *in the place of* SIR JAMES SHAW WILLES.

The Hon. Sir George Essex Honyman, Bart. *Q.C.*, 1866; *created Serjeant and appointed a Justice of the Court of Common Pleas in* 1873 (*Jan.* 23) *in the place of* Sir John Barnard Byles. *Resigned in* 1875. *Died on Sept.* 16, 1875.

Sir John Duke Coleridge. *See* Queen's Bench Division.

The Hon. Sir Thomas Dickson Archibald. *Created Serjeant and appointed a Justice of the Court of Queen's Bench in* 1872 (*Nov.* 20), *in the place of* Sir James Hannen; *transferred to the Court of Common Pleas in* 1875 (*Feb.* 6), *in the place of* Sir Henry Singer Keating. *Died on October* 18, 1876.

Sir John Walter Huddleston. *See* Exchequer Division.

Sir Nathaniel Lindley. *See* Lords Justices of Appeal.

[On the 1st November, 1875, by virtue of 36 & 37 Vict. c. 66, s. 5, the then Judges of the Court of Common Pleas became Judges of the High Court. They were attached to the Common Pleas Division. By 40 & 41 Vict. c. 9 (April 24, 1877) they are to be styled "Justices of the High Court."]

Sir Henry Charles Lopes. *See* Lords Justices of Appeal.

[The Common Pleas Division was consolidated with the Queen's Bench Division by Order in Council of December 16, 1880.]

JUSTICES OF THE HIGH COURT (EXCHEQUER DIVISION).

[The following were Judges of the former Court of Exchequer.]

The Right Hon. Sir Frederic Pollock. *K.C.*, 1827; *Attorney-General,* 1834 *and* 1841; *first returned to Parliament in* 1831 *for Huntingdon: created Serjeant, and appointed Lord Chief Baron of the Court of Exchequer in* 1844 (*April* 15). *Resigned in* 1866. *Died on August* 22, 1870.

The Rt. Hon. Sir Samuel Martin. *Q.C.* 1843; *first returned to Parliament in* 1847 *for Pontefract; created Serjeant and appointed a Baron of the Court of Exchequer,* 1850 (*Nov.* 7). *Resigned in* 1874, *and was named a Privy Councillor. Died on January* 9, 1883.

Sir George William Wilshere Bramwell. *See* Lords Justices of Appeal.

The Hon. Sir William Fry Channell. *Serjeant,* 1840; *Q.C.,* 1848; *a Baron of the Court of Exchequer,* 1857 (*Feb.* 13). *Resigned in* 1873. *Died on Feb.* 26, 1873.

The Hon. Sir Gillery Pigott. *Serjeant,* 1856; *first returned to Parliament in* 1860 *for Reading; a Baron of the Court of Exchequer,* 1863 (*Oct.* 3). *Died on April* 28, 1875.

The Right Hon. Sir Fitzroy Kelly. *K.C.*, 1835; *Solicitor-General,* 1845, *and again in* 1852; *Attorney-General,* 1858; *first returned to Parliament in* 1835 *for Ipswich*; *created Serjeant and appointed Lord*

Chief Baron of the Court of Exchequer in 1866 (*July* 16), *in the place of* Sir Frederic Pollock. *Died on Sept.* 17, 1880.

The Hon. Sir Anthony Cleasby. *Q.C.*, 1861; *created Serjeant, and appointed in* 1868 (*Aug.* 25) *a Baron of the Court of Exchequer, in pursuance of* 31 *&* 32 *Vict. c.* 125, *s.* 11, *sub-s.* 8. *Resigned in* 1879. *Died on Oct.* 6, 1879.

The Hon. Sir Charles Edward Pollock. *Q.C.*, 1866; *created Serjeant and appointed a Baron of the Court of Exchequer in* 1873 (*Jan.* 10), *in the place of* Sir William Fry Channell.

Sir Richard Paul Amphlett. *See* Lords Justices of Appeal.

The Hon. Sir John Walter Huddleston. *Q.C.*, 1857; *Judge Advocate of the Fleet,* 1865; *first returned to Parliament in* 1865 *for Canterbury; created Serjeant and appointed a Justice of the Court of Common Pleas in* 1875 (*Feb.* 22), *in the place of* Sir George Essex Honyman, Bart; *transferred to be a Baron of the Court of Exchequer in* 1875 (*May* 12), *in the place of* Sir Gillery Pigott.

[On the 1st Nov. 1875, by virtue of 36 & 37 Vict. c. 66, s. 5, the then Barons of the Court of Exchequer became Judges of the High Court. They were attached to the Exchequer Division. By 40 & 41 Vict. c. 9 (April 24, 1877), they are to be styled "Justices of the High Court."]

The Hon. Sir Henry Hawkins. *Q.C.*, 1858; *a Justice of the High Court* (*Queen's Bench Division*) *in* 1876 (*Nov.* 2), *in the place of* Sir Colin Blackburn; *transferred to the Exchequer Division in* 1876 (*Nov.* 14), *in the place of* Sir Richard Paul Amphlett.

The Hon. Sir James Fitzjames Stephen, K.C.S.I. *Q.C.*, 1868; *a Justice of the High Court* (*Exchequer Division*) *in* 1879 (*Jan.* 15), *in the place of* Sir Anthony Cleasby.

[The Exchequer Division was consolidated with the Queen's Bench Division by Order in Council of Dec. 16, 1880.]

JUSTICES OF THE HIGH COURT (PROBATE, DIVORCE, AND ADMIRALTY DIVISION).

[The following were Judges of the former Probate, Matrimonial, and Divorce Courts.]

The Right Honourable Lord Penzance (Sir James Plaisted Wilde). *See* The Court of Arches.

The Rt. Hon. Sir James Hannen, *created Serjeant and appointed a Justice of the Court of Queen's Bench, in* 1868 (*Feb.* 25), *in the place of* Sir William Shee; *transferred to be Judge of the Probate, Matrimonial, and Divorce Courts in* 1872 (*Nov.* 20), *in the place of* Lord Penzance. *He became a Justice of the High Court in* 1875 *by virtue of* 36 *&* 37 *Vict. c.* 66, *s.* 5, *and was made President of the Probate, Divorce, and Admiralty Division.*

[The following were Judges of the former High Court of Admiralty.]

THE RT. HON. STEPHEN LUSHINGTON. *See* The Court of Arches.

THE RT. HON. SIR ROBERT JOSEPH PHILLIMORE, BART. *D.C.L.*, 1839; *first returned to Parliament in* 1853 *for Tavistock; Q.C.*, 1858; *Queen's Advocate*, 1862 (*Sept.* 12); *Judge of the Court of Arches in* 1867 (*Aug.* 1), *in the place of* THE RIGHT HON. STEPHEN LUSHINGTON; *Judge of the High Court of Admiralty in* 1867 (*Aug.* 23), *in the place of* THE RIGHT HON. STEPHEN LUSHINGTON; *he became a Judge of the High Court in* 1875 *by virtue of* 36 & 37 *Vict. c.* 66, *s.* 5, *and was attached to the Probate, Divorce, and Admiralty Division. Resigned in* 1883. *Died on Feb.* 4, 1885.

THE HON. SIR CHARLES PARKER BUTT. *Q.C.*, 1868; *first returned to Parliament in* 1880 *for Southampton; appointed a Justice of the High Court* (*Probate, Divorce, and Admiralty Division*) *in* 1883 (*March* 31), *in the place of* SIR R. J. PHILLIMORE.

THE COURT OF ARCHES.

THE RIGHT HONOURABLE STEPHEN LUSHINGTON. *First returned to Parliament in* 1807 *for Great Yarmouth; D.C.L.*, 1808; *Judge of Consistory Court*, 1828; *Judge of the High Court of Admiralty*, 1838 (*Oct.* 17); *Judge of the Court of Arches*, 1858 (*July* 2). *Resigned in* 1867. *Died on Jan.* 19, 1873.

THE RT. HON. SIR ROBERT JOSEPH PHILLIMORE. *See* Probate, Divorce, and Admiralty Division.

THE RT. HON. LORD PENZANCE (SIR JAMES PLAISTED WILDE). *Q.C.*, 1855; *created Serjeant and appointed a Baron of the Exchequer*, 1860; *appointed Judge of the Probate, Matrimonial, and Divorce Courts in* 1863 (*Sept.* 3); *raised to the peerage* 1869 (*April* 6); *resigned the office of Judge of the Probate, Matrimonial, and Divorce Courts in* 1872 (*Nov.* 19); *Judge of the Court of Arches*, 1875 (*Oct.* 20), *in the place of* SIR R. J. PHILLIMORE.

THE COURT OF BANKRUPTCY.

[From Oct. 1, 1851, to Jan. 1, 1870, the Lords Justices were the Judges of Appeal in Bankruptcy under the Bankrupt Law Consolidation Act, 1849, amended by 14 & 15 Vict. c. 83, s. 7.]

See Lords Justices of Appeal.

[In 1869 by 32 & 33 Vict. c. 71, s. 61, a Chief Judge of the London Bankruptcy Court was appointed.]

See Chancery Division—SIR JAMES BACON.

[But the Lords Justices still continued to have an original and an appellate jurisdiction in bankruptcy by virtue of s. 71 of the last-named Act; and by

30 & 31 Vict. c. 64, s. 1, this jurisdiction was also exercisable by either of them, or by the Lord Chancellor.]

See Lords Justices of Appeal and *see* The Lord Chancellors.

[In 1883 by 46 & 47 Vict. c. 52, s. 93, the powers of the London Bankruptcy Court were transferred to the High Court; for Appeals, see s. 104 and 47 Vict. c. 9.]

See Queen's Bench Division—Sir Lewis W. Cave.

THE ATTORNEYS-GENERAL.

Sir Roundell Palmer. *See* The Lord Chancellors.

Sir Hugh M'Calmont Cairns. *See* The Lord Chancellors.

Sir John Rolt. *See* Lords Justices of Appeal.

The Rt. Hon. Sir John Burgess Karslake. *Q.C.*, 1861; *Solicitor-General*, 1866 (*Nov.* 29), *in the place of* Sir William Bovill; *first returned to Parliament in* 1867 *for Andover*; *Attorney-General*, 1867 (*July* 18), *in the place of* Sir John Rolt; *and again in* 1874 (*Feb.* 27), *in the place of* Sir Henry James. *Resigned in* 1874, *and was named a Privy Councillor in* 1876. *Died on Oct.* 4, 1881.

Sir Robert Porrett Collier. *See* Common Pleas Division.

Sir John Duke Coleridge. *See* Queen's Bench Division.

The Right Hon. Sir Henry James. *Q.C.*, 1869; *first returned to Parliament in* 1869 *for Taunton*; *Solicitor-General*, 1873 (*Oct.* 2), *in the place of* Sir George Jessel; *Attorney-General*, 1873 (*Nov.* 20), *in the place of* Sir John Duke Coleridge; *and again in* 1880 (*May* 3) *in the place of* Sir John Holker. *Resigned in* 1885, *and was named a Privy Councillor the same year.*

Sir Richard Baggallay. *See* Lords Justices of Appeal.

Sir John Holker. *See* Lords Justices of Appeal.

Sir Richard Everard Webster. *Q.C.*, 1878; *first returned to Parliament in* 1885 *for Launceston*; *Attorney-General in* 1885 (*June* 26), *in the place of* Sir Henry James; *and again in* 1886 (*Aug.* 5), *in the place of* Sir Charles Russell.

Sir Charles Russell. *Q.C.* 1872; *first returned to Parliament in* 1880 *for Dundalk*; *Attorney-General*, 1886 (*Feb.* 9), *in the place of* Sir Richard Webster. *Resigned in* 1886.

THE SOLICITORS-GENERAL.

Sir Robert Porrett Collier. *See* Queen's Bench Division.

Sir William Bovill. *See* Common Pleas Division.

Sir John Burgess Karslake. *See* Attorneys-General.

Sir Charles Jasper Selwyn. *See* Lords Justices of Appeal.

Sir William Baliol Brett. *See* The Masters of the Rolls.

Sir Richard Baggallay. *See* Lords Justices of Appeal.

Sir John Duke Coleridge. *See* Queen's Bench Division.

Sir George Jessel. *See* The Masters of the Rolls.

Sir Henry James. *See* Attorneys-General.

Thr Right Hon. Sir William George Granville Venables Vernon Harcourt. *Q.C.*, 1866; *first returned to Parliament in* 1868 *for Oxford; Solicitor-General,* 1873 (*Nov.* 20), *in the place of* Sir Henry James. *Resigned in* 1874, *and was named a Privy Councillor in* 1880.

Sir John Holker. *See* Lords Justices of Appeal.

Sir Hardinge Stanley Giffard. *See* the Lord Chancellors.

Sir Farrer Herschell. *See* the Lord Chancellors.

Sir John Eldon Gorst. *Q.C.*, 1875; *first returned to Parliament in* 1866 *for Cambridge; Solicitor-General,* 1885 (*July* 2), *in the place of* Sir Farrer Herschell. *Resigned in* 1886.

Sir Horace Davey. *Q.C.* 1875; *first returned to Parliament in* 1880 *for Christchurch; Solicitor-General* 1886 (*Feb.* 16), *in the place of* Sir John E. Gorst. *Resigned in* 1886.

Sir Edward Clarke. *Q.C.*, 1880; *first returned to Parliament in* 1880 *for Southwark; Solicitor-General,* 1886 (*Aug.* 6), *in the place of* Sir Horace Davey.

THE QUEEN'S ANCIENT SERJEANT.

James Manning, Esq. *Serjeant,* 1840; *Queen's Serjeant,* 1846; *Queen's Ancient Serjeant,* 1849. *Died on August* 29, 1866.

No new appointment has been made to this office.

THE QUEEN'S ADVOCATES.

Sir Robert Joseph Phillimore. *See* Probate, Divorce, and Admiralty Division.

Sir Travers Twiss. *Q.C.*, 1858; *Advocate,* 1841; *Advocate-General of the Admiralty,* 1862; *the Queen's Advocate-General,* 1867 (*Aug.* 27), *in the place of* Sir R. J. Phillimore. *Resigned in* 1872.

No new appointment has been made to this office, but some of the duties were fulfilled until the year 1886, by Sir James Parker Deane, Q.C., LLD., Admiralty Advocate.

G. S. B.

ERRATUM.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL

[HOUSE OF LORDS.]

THE VESTRY OF THE PARISH OF ST. JOHN, HAMPSTEAD . . . . . } APPELLANTS;

AND

HENRY HORACE POWELL COTTON . RESPONDENT.

H. L. (E.) 1886 Dec. 3.

Metropolis Management Acts—Sewers, Expense of constructing—Owners of Land abutting on "Street"—"Street"—"New Street"—Metropolis Management Acts 1855 (18 & 19 *Vict. c.* 120) *s.* 250; *and* 1862 (25 & 26 *Vict. c.* 102) *ss.* 52, 53, 112.

The words "a street" in sect. 53 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) include "new streets" as defined by sect. 112, as well as old streets.

In 1872 a road in the metropolis which had up to that time been a turnpike road ceased to be a turnpike road and became a common highway. In 1883 the vestry of the parish in which the road was constructed a sewer and apportioned part of the expense of construction to the owner of lands abutting on the road. Previously to 1883 there had been no sewer in this part of the road. Sewers' rates had been levied for five years prior to the 1st of January 1856 in respect of these lands:—

Held, affirming the decision of the Court of Appeal (16 Q. B. D. 475), that the case fell under sect. 53 and not under sect. 52 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102); that the road was a "street" within the meaning of sect. 53 as defined by sect. 112 of

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that Act, and that the lands were under the proviso in sect. 53 exempt from apportionment.

Vestry of St. Giles Camberwell v. *Weller* (Law Rep. 6 Q. B. 168, n.) and *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved. *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) overruled.

APPEAL from a decision of the Court of Appeal upon a special case which is set out in the report of the decision below (1). For the present report the following outline of the facts will suffice.

In 1872 a portion of the Edgware Road (which up to that time was a turnpike road) ceased to be a turnpike road and became a common highway by virtue of the Metropolis (Kilburn and Harrow) Roads Act 1872 (35 & 36 Vict. c. xlix.) s. 11. In 1883 the vestry of the parish of St. John, Hampstead, constructed a brick sewer in that portion of the road which was situate within the parish for the purpose of draining houses erected or to be erected on the lands abutting on that portion of the road. Previously to 1883 there was no sewer in this part of the Edgware Road. The total cost of the sewer was £5329 3*s.* 6*d.*, of which the vestry apportioned two thirds on the adjoining owners, charging £2162 0*s.* 5*d.* to the respondent as owner of lands abutting on that portion of the road. Sewers rates were levied for five years prior to the 1st of January 1856 in respect of the whole of the respondent's said lands. The vestry having brought an action against the respondent, the question for the opinion of the Court was, whether the sum of £2162 0*s.* 5*d.* or some part thereof, was due and payable by the respondent to the vestry. The Queen's Bench Division (Pollock B. and Manisty J.) gave judgment for the plaintiffs for £2121 1*s.* The Court of Appeal (Lord Esher M.R., Cotton and Bowen L.JJ.) reversed this decision and gave judgment for the defendant. From this decision the vestry appealed.

1886. Dec. 2, 3. *Philbrick* Q.C. (*English Harrison*, with him) for the appellants:—

The subordinate question as to the £39 6*s.* 3*d.* raised below is not now insisted on. The only question is whether this part of the Edgware Road is a "new street" within the meaning of

(1) 16 Q. B. D. 475.

sect. 52 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102) or whether it comes within the operation of sect. 53 (1).

Before 1855 the law on this subject was regulated by sects. 34, 36, and 76 of 11 & 12 Vict. c. 112, which gave power to the Commissioners to exempt from sewers' rate places chiefly used for agricultural purposes if the Commissioners thought proper to do so, and also directed them to continue previous exemptions. In 1852 15 & 16 Vict. c. 64 was passed: by sect. 1 of which all

(1) Sect. 52: "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st of January, 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just. . . ."

Sect. 53: "Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district . . . .: provided that no street or property in respect of which sewers rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under the provision contained in this section."

By sect. 112: "The word 'street' shall be deemed to apply to and include the subject-matters specified in the 250th section of" 18 & 19 Vict. c. 120, "and also any mews and a part thereof; the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the Commissioners, trustees, surveyors or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out."

By sect. 250 of 18 & 19 Vict. c. 120: "The word 'street' shall apply to and include any highway (except the carriage way of any turnpike road). . . . ."

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arable and garden land and land of that character was to be charged only to the extent of one fourth of the net annual value of the land. The option to exempt given to the Commissioners by the Act of 1848 was thus altered, and all land was chargeable, except where expressly exempt. See also sects. 163, 164 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) to the same effect. Then came the Metropolis Management Act 1862 ss. 52, 53. The present clearly is a case of a "new street" within the meaning of sect. 52, and though the respondent contends the contrary, both Courts below thought this was a "new street." The construction of the Court of Appeal, making sect. 53 applicable to new streets as well as old streets, leaves no, or practically no, application for sect. 52. The more reasonable construction is to apply sect. 53 only to those cases for which a sewer has been constructed and which are not dealt with by sect. 52. Remembering the state of the former law and that open land was all chargeable to the extent of one-fourth, is it in any degree probable that the legislature intended to exempt new streets for which a sewer was required to be built, merely because the land had previously paid something, perhaps a trifle, for sewers rates? That construction makes sect. 52 inapplicable to new streets whenever sewers rates have previously been paid, and limits the applicability of sect. 52 to cases of new streets where previously there had been a sewer. That seems a very unreasonable construction, for where are any such streets to be found? The appellants' construction gives due scope to each of the sections, and the reasons for their contention are to be found in the judgments of Blackburn and Lush JJ. in *Sawyer* v. *Paddington Vestry* (1), where the Court had before it the judgment of the Exchequer (Bramwell, Channell, and Cleasby BB.) in *Vestry of St. Giles Camberwell* v. *Weller* (2) to the contrary effect. The question again came up for decision before Bramwell B. and Denman J. in *Sheffield* v. *Fulham Board* (3), where the Court adhered to the previous opinion of Bramwell B., but neither of the two earlier cases was cited to the Court during the argument or referred to in the judgment. The true scope

(1) Law Rep. 6 Q. B. 164. (2) Law Rep. 6 Q. B. 168, n.
(3) 1 Ex. D. 395.

of these enactments appears from the decision in *Dryden* v. *Overseers of Putney* (1). There are no doubt difficulties in either view, but there are more in the way of the respondents' than of the appellants' construction, having regard to the previous law as explained above.

[LORD WATSON referred to the power of exemption given to the vestry or district board by sect. 159 of 18 & 19 Vict. c. 120.]

Sir *R. Webster* A.G. (*James G. Wood*, with him) for the respondent:—

The construction put upon sect. 53 of the Act of 1862 by the Court of Appeal is correct. There is no difficulty in applying sect. 52 to the case of an old country road with a covered sewer which by the building of houses becomes a "new street" in the statutory sense, as has been decided in *Pound* v. *Plumstead Board of Works* (2) may be the case. There is nothing unusual or unnatural in such a case. The present case is within the express words of sect. 53: and there is no absurdity or contradiction in so construing it: there are no words to take it out of sect. 53. In *Sawyer* v. *Paddington Vestry* (3) Blackburn J. fell into the error of supposing that the proviso at the end of sect. 53 was limited to the case where sewers rates had been paid for houses. It is not so limited, but equally applies to payment for "property" of any kind.

Philbrick Q.C. in reply:—

The effect of the respondent's construction is to give the landowner the benefit of a new sewer in agricultural land at the expense of the ratepayers, when that land is developed for building purposes.

LORD HALSBURY L.C.:—

My Lords, in this case the inquiry is as to the true construction of two sections of a statute; and for my own part I am prepared to move your Lordships' judgment simply upon the construction of those two sections according to the ordinary and

(1) 1 Ex. D. 223. (2) Law Rep. 7 Q. B. 183.
(3) Law Rep. 6 Q. B. at p. 171.

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Lord Halsbury, L.C.

natural interpretation of the words and sentences therein contained. Doubtless there are cases in which when in the instrument itself, whether a will or a contract or a statute, evidences may be discovered of the general intention of the framer and of the general meaning, or what has been called the governing sense, in which the words or the provisions are to be understood, you may occasionally modify the language which you have to construe with reference to that general intention which has been so ascertained.

In this case I confess myself wholly unable to discover any general intention upon which I can rely as governing or modifying the language which the legislature has used. It is obvious that two sets of learned judges have construed these sections differently according as they have regarded the object which the legislature had in view; and each of them has in turn pointed out the absurdities which would be the result of the opposite construction to that which their Lordships have favoured. That seems to me to shew that at all events it is difficult, if not impossible, to obtain any such key to the statute as is to be found in its ascertained governing intention. The result of that appears to me to be that your Lordships should place upon it that construction which every Court is bound to place upon any instrument whatsoever; namely that if there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains, it must be construed in the ordinary and natural meaning of the words and sentences.

In this case whereas your Lordships have a matter which is expressly within the ordinary and natural language of sect. 53, you are asked at the Bar not to understand the language which applies to that subject-matter in the ordinary and natural sense of the words, but to distort the language in order to give effect to what is assumed to have been the intention of the legislature, which however, as I have said, it is obvious you cannot find.

Apart from the language of the statute itself, and apart from some supposed intention to be ascertained within the four corners of the statute, your Lordships have been informed of a variety of facts which it is said may throw light upon what was the intention of the legislature. For my own part I am unable

to accept either the accuracy or the relevancy of that statement. It may very well be that the legislature had before them facts which induced them, at the particular period when this legislation was being discussed, to attempt to provide for cases which subsequent experience proves them not to have provided for. One knows historically, of course, that the system of drainage in this metropolis has undergone a very considerable amount of modification by legislation; but, speaking for myself, I am wholly unable to construe any part of this system of legislation with reference to that historical fact of the alteration of the system of drainage.

Under these circumstances there seems to me to be only one safe course for your Lordships to adopt, namely, to abide by the plain language of the statute, and I therefore move your Lordships that the judgment of the Court of Appeal be affirmed and that this appeal be dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion. The question before us turns upon the construction of the 52nd and 53rd sections of the Act of 1862. The 53rd section provides that in the case of certain streets where a sewer is being constructed for the first time, if the property abutting upon the street has been assessed for sewers rates previously, the proprietors shall only be liable in a portion of the cost, the balance being provided out of the general rate; and the section further provides that if sewers rates have been paid in respect of such property for five years previous to the 1st of January 1856 the whole cost of construction shall be borne by the ratepayers.

The word "street" in sect. 53 admittedly means, according to its natural and ordinary construction, any and every street. On the part of the appellants it is contended that it must be read, for the purposes of the Act, as limited to old streets or to streets other than new streets as defined by sect. 112 of the statute. It is quite possible that such a construction might become imperative; but in order to justify a departure from the primary meaning of the words of the legislature, it must be shewn either that the ordinary and grammatical construction of the words would lead to some absurdity, such as the legislature could never have

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contemplated, or that it would be plainly contrary to the general scheme disclosed in the context of the statute. It does not appear to me that any such case has been made out. It would be difficult, in framing the provisions of a statute like this, to provide that absolute justice shall be done in all cases, and that there shall be no hardship resulting in any single case from the operation of the Act.

It was maintained that the effect of reading sect. 53 as it has been construed by the Court of Appeal would be to abrogate and neutralize the provisions of sect. 52. It was said that practically the whole property within every district is subject, and must be subject, to the payment of sewers rates, and that therefore if you included new streets under the word "street" in sect. 53 there would in reality be no new streets falling under the operation of the preceding section. That argument does not appear to me to rest upon a solid basis of fact. The older statutes, beginning with the Act of 1848, enabled the authorities who were executing the statutes to exclude from the assessments of sewers rates certain portions of the districts assigned to them. That was altered by the Act of 1855; but the 159th section of that statute contains a very important provision, which enables and authorizes the vestry or district board to exempt from sewers rates such parts of the locality within their jurisdiction as are not benefited by the expenditure which they are making. Therefore if that discretionary power was in point of fact exercised, as the legislature undoubtedly intended it should be, there are only two alternatives open—either there was in some districts property which was not benefited by the expenditure and was therefore exempt, or the whole area must have benefited by the expenditure already made and must have contributed its share towards that expenditure.

I think it is a very reasonable reading of these two sections, and it attaches to the words of the sections their natural and ordinary meaning, to hold that property which had paid rates in the circumstances specified in sect. 53 should not be made liable for more than a proportion of the expenses, or, if it had paid rates for five years before the 1st of January 1856, should be exempted altogether, and that only those parts of the district

area which had not benefited by previous expenditure and which had therefore not contributed to such expenditure should be liable for the full amount required to make drains for their benefit under sect. 52 of the Act.

On these grounds it appears to me that the construction which the Court of Appeal have put upon sect. 53 is not only according to the plain and ordinary meaning of the language which the legislature have employed, but leads to results which are not inequitable. I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD FITZGERALD :—

My Lords, I concur, and would say no more but for my great respect for the eminent judges who have differed in opinion upon the question before us.

We are to read sects. 52 and 53 in their ordinary sense unless it shall have been made to appear that a literal and grammatical interpretation would necessarily create difficulties and injustices which the legislature could not be taken to have intended. In my opinion no sufficient grounds have been disclosed to induce us to depart from the ordinary, literal, and grammatical construction, and to interpolate words in sect. 53 which are not to be found in that section.

Sect. 52 is confined to cases of sewers constructed "for the drainage of any new street, or of any house or houses erected since the 1st of January 1856," the expenses of which are to be borne "by the owners of such street or houses and of the land abutting on such street." Mr. Philbrick contends that sect. 52 embraces all new streets which come within the definition of, or which popularly may be called, "new streets"; and it would be just that the owners of such property should pay the expenses of the construction of a sewer made for their benefit; but it would cease to be just if that property had been previously taxed for sewers rates without receiving any equivalent. That injustice was to be provided against as well as the case of old streets in a similar condition, that is to say where sewers rates had been levied previously without any equivalent.

Sect. 53 embraces both cases. It applies to streets both new

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and old where there has been no sewer but where sewers rates have been levied previously, in which case the owners are made subject only to an apportionment to be determined by the vestry, but they are to be free of charge if sewers rates have been levied for five years prior to the 1st of January 1856.

Such seems to me to be the plain interpretation of the two sections; and I have been able unable to discover any such difficulties or anomalies arising from that interpretation as to lead me to the conclusion that the "governing intention" of the legislature was something different from that which it has literally expressed.

The case in all its aspects has been so fully and clearly disposed of by my noble and learned friends that I forbear to make any further observations.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd December 1886.

Solicitor for appellants: *W. Gribble.*

Solicitors for respondent: *A. F. & R. W. Tweedie.*

[HOUSE OF LORDS.]

THE ROYAL EXCHANGE SHIPPING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

W. J. DIXON & Co. . . . . RESPONDENTS.

H. L. (E.) 1886 Dec. 7.

Ship—Deck Cargo—Jettison of Deck Cargo—Liability of Shipowner to Shipper for Deck Cargo jettisoned — Contract, Breach of — Damage—Proximate Cause of Damage.

On a ship carrying a general cargo from New Orleans to Liverpool cotton was shipped on deck, under a practice by which owners of vessels trading between those ports were in the habit of stowing goods on deck in violation of their contract with the shipper, the shipowners accepting full responsibility for the consequences. The bills of lading for part of the cotton contained the words "under deck." All the bills of lading contained exceptions (inter alia) in favour of "jettison." On the voyage the ship took ground, and in order to get her off the master properly jettisoned the cotton. The indorsees of the bills of lading having brought an action against the shipowners to recover the value of the cotton:—

Held, affirming the decision of the Court of Appeal, that (whether the bills of lading did or did not contain the words "under deck") the cotton was carried in breach of the contract and was not within the exceptions specified in the bills of lading, which had exclusive reference to goods safely stowed under hatches; that the shipowners had therefore no legal excuse for their failure to deliver; that the cause of damage was not too remote, and that the shipowners were liable to the indorsees for the value of the cotton.

APPEAL from a decision of the Court of Appeal.

In November 1883 one J. M. Dixon shipped on board the appellants' vessel at New Orleans for Liverpool 125 bales of cotton, part of a larger consignment. Of the 125 bales all except twenty-five were shipped under bills of lading which contained the words "under deck." The bill for the remaining twenty-five did not contain those words. In all the bills of lading the cotton was expressed to be shipped in good order and well conditioned; and all contained exceptions (inter alia) in favour of "jettison," "negligence or default of master or other persons in the service of the ship whether in navigating the ship or otherwise," "and all and every the dangers and accidents of

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the seas and of navigation of whatever nature and kind." Part of the cotton, including the 125 bales, was carried on deck. The ship, which carried a general cargo, in the course of her voyage to Liverpool took the ground in the straits of Florida, and in order to get her off it became necessary and proper to jettison portions of the cargo, viz., the cotton stowed on the fore deck, and some oilcake in the forehatch. Among the cargo so jettisoned were the 125 bales. The respondents as indorsees of the bills of lading brought this action against the appellants for the value of the 125 bales, alleging that the defendants negligently and improperly stowed the cotton on deck in a dangerous position and failed to deliver it, the short delivery not being covered by the exceptions in the bills of lading. The appellants in their defence denied the negligence and improper stowage, alleged that the short delivery occurred by reason of the excepted perils, that is to say, jettison and the dangers and accidents of the seas and navigation, and alleged that by custom of the port of New Orleans and of the trade in which the vessel was engaged the defendants were entitled to carry a deck cargo and to stow the cotton on deck.

At the trial before Cave J. without a jury at the Liverpool Summer Assizes 1884 the defendants alleged and the plaintiffs admitted a practice with regard to goods carried on deck "at shipowner's risk" which this House (as appears from the judgment of Lord Watson) found to be in substance this,—that owners of vessels trading between New Orleans and Liverpool were in the habit of stowing on deck, in violation of their contract with the shipper, they accepting full responsibility for the consequences. Cave J. entered judgment for the defendants. The Court of Appeal (Brett M.R. Baggallay and Bowen L.JJ.) on the 18th of May 1885 reversed this decision and entered judgment for the plaintiffs for the value of the 125 bales. Against this decision the defendants appealed.

Nov. 15, 16. Sir *Horace Davey* Q.C. and *Haldane* for the appellants:—

The contract is in the bills of lading, and by the exceptions in the bills the shipowner is not liable for goods jettisoned, there

being no question as to the propriety of the jettison. The plaintiffs being the indorsees of the bills and suing on the bills are bound by the terms of the bills: one of which is that the shipowner is not liable for goods jettisoned, however caused. It is no answer to say that there is a breach of contract in carrying goods on deck when the contract was to carry under deck, because the shipowner is liable only for damages of which the breach of contract is the proximate cause. Here the breach of contract was not the proximate cause of the ship's stranding or the jettison. It is not as if the goods had been damaged by sea-water or any cause which must be attributed to deck-stowage. The exception in the bills of lading as to jettison means jettison whether proper or improper, and jettison is an act done by the master, as the agent not of the shipowner but of the cargo owner. The right of jettison does not arise out of the contract of carriage, but out of the old Rhodian laws: *Burton* v. *English* (1). The practice or custom alleged and proved excuses the short delivery, which was occasioned by the perils excepted in the bills of lading. This at all events applies to the twenty-five bales which were not expressed to be carried "under deck," but it must be admitted that the practice does not apply to the bales which the bills stated were to be carried "under deck."

The plaintiffs may say that by the goods being carried on deck they lost their right of general contribution against the other cargo owners. The answer to this is the practice or custom to carry on deck, which the plaintiffs must be taken to have known and assented to. The stipulation as to part of the cargo being carried "under deck" shews a knowledge that some goods would be carried on deck, viz. those as to which there was no such stipulation. The rule that deck-carried cargo is not entitled to general average is not universal but applies only where deck stowage is improper or contrary to usage. In an action against underwriters in respect of a general average contribution it is no sufficient answer to allege that the goods were carried on deck: *Milward* v. *Hibbert* (2); *Miller* v. *Tetherington* (3). No doubt in *Wright* v. *Marwood* (4) there are expressions of Bramwell L.J. in delivering

(1) 12 Q. B. D. 218, 220.
(2) 3 Q. B. 120.
(3) 6 H. & N. 278; 7 Ibid. 954.
(4) 7 Q. B. D. 72.

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judgment which are unfavourable to the defendants, but they are only dicta. And *Burton* v. *English* (1) is distinctly in favour of the defendants' contention. The plaintiffs allege negligent stowage and carriage, and assuming the practice alleged to be invalid, stowing on deck is negligence. But it is the negligence of the master, which is excepted in the bills of lading: see *Steel* v. *State Line Steamship Company* (2). The practice is to carry on deck "at shipowner's risk." This risk is limited to loss arising in consequence of the deck-stowage, e.g. from sea-water, rain &c. The words have no reference to risk of jettison or to general average. The shipper is bound to know of the existence of such a usage as was proved in the present case: *Vallance* v. *Dewar* (3). The effect of the words "at shipowner's risk" is at the most to make the shipowner a common carrier but would not make him liable for jettison. Jettison properly made is not a breach of contract. The plaintiffs sue in respect not of the jettison but of the carrying on deck. In any case the damages are not the whole value of the goods, but the loss sustained by the plaintiffs in not being able to claim general average.

Sir *C. Russell* Q.C. and *Cohen* Q.C. (*D. French* Q.C. and *J. Gorell Barnes* with them) for the respondents:—

The shipowners admit that the goods on deck were carried at their risk. There was no consent by the shippers to the stowing on deck. The shipowners in order to increase the amount of freight carried more cargo than the ship could carry below deck. The only recognised mode of stowing is under deck, unless in the case of express contract or custom. There is, therefore, no distinction between the case of the twenty-five bales and the others. The exceptions in the bills of lading have no reference to any case except that of goods carried in the ordinary way, i.e., under deck. The argument of the defendants is inconsistent; they say they were entitled to stow on deck, and also that such stowage was the negligence of the master. The argument as to remoteness of damage is contrary to authority: *Stephens* v. *Australasian Insurance Company* (4); which decision implies that the shipper was

(1) 12 Q. B. D. 218.
(2) 3 App. Cas. 72.
(3) 1 Camp. 503.
(4) Law Rep. 8 C. P. 18.

entitled to recover the amount of the goods jettisoned. It is no answer to say that the goods might have been equally jettisoned if stowed below deck: no wrongdoer can take advantage of his own wrong: *Davis* v. *Garrett* (1); *Scaramanga* v. *Stamp* (2). Goods on deck, as a matter of fact, always are jettisoned first, because they are most accessible. There is no instance of a case in which where the shipowner has failed to deliver goods the damages have been limited to the amount of the loss of contribution. The breach of contract is not merely in not carrying according to the contract, but in not delivering: and the breach is not excused by such a jettison. The evidence of the practice here alleged is very different from that of the custom stated in the books. To make a good usage it must be so general and universal in the trade that everybody must be presumed to have known it: 1 Arnould on Ins. (5th ed.) p. 198, citing *Bartlett* v. *Pentland* (3). To create a liability to general average contribution the master must act as the agent of the shippers: in jettisoning goods stowed on deck he has no such authority. As to deck cargoes, the authorities, both English and American, are all against the appellants: Emerigon on Insurances, translated by Meredith, cap. 12, s. 42; 3 Kent. Comm. 240; 1 Parsons on Shipping, 357; *Gould* v. *Oliver* (4).

Haldane, in reply:—

The reason why shippers have been allowed to recover the whole value of the goods is because the carrier is an insurer: 1 Parsons on Shipping, 173. The true answer to the respondents' argument is, that the loss for which they claim does not arise out of the breach of contract (if any). There was no connection between the two things. Suppose the ship had been totally lost through one of the excepted perils or the act of God, could the owner of deck cargo recover the amount when the owner of cargo carried below deck could not? Clearly not: there is no authority for such a proposition. At all events the plaintiffs if entitled to recover something cannot recover the whole value of the 125 bales; for other goods besides the plaintiffs' having been jettisoned there would have been a claim against the plaintiffs' goods

(1) 6 Bing. 716, 722.
(2) 4 C. P. D. 316.
(3) 10 B. & C. 760.
(4) 2 M. & G. 208, 233, 236.

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for general average contribution. Their claim for the value of the goods must therefore, at least, be subject to a deduction for that amount. The plaintiffs cannot be better off than if their goods had come safe to port.

The House took time for consideration.

Dec. 7. LORD HALSBURY L.C.:—

My Lords, in this case the respondents, indorsees of four bills of lading of certain cotton shipped on board the appellants' screw steamer *Egyptian Monarch*, sue the appellants, the owners of the steamer in question, for the non-delivery to them in Liverpool of certain portions of the cotton which were jettisoned during the voyage by reason of the *Egyptian Monarch* having taken the ground. The cotton in question was stowed on deck, and with respect to three of the bills of lading it could not be denied that the bills of lading themselves expressly stipulated that the cotton should be stowed under deck. With respect, however, to the fourth bill of lading the words "under deck" are not to be found in it.

It appears to me that there is no real difference between the bills of lading: "Expressio eorum quæ tacite insunt nihil operatur"; and I think it is clear, therefore, that this cotton was carried under a contract that it should be stowed under deck. The exception in the bills of lading of "jettison" cannot avail the shipowners, who broke their contract in stowing the cotton upon deck and thereby directly caused the loss to the merchants. That this would be the general law was not indeed disputed, but it was said that a practice prevailed at Liverpool, so extensively practised that it must have been known to the plaintiffs, of loading cotton upon deck.

But the very same evidence which established the practice, established also that the shipowners paid for any damage resulting from the practice. Now, as they could only be called upon to pay as for a breach of their contract, it follows that the supposed practice established no more than this,—that a great many people in Liverpool were in the habit of acting in breach of the contract into which they had entered, and were in the habit of paying damages when injury resulted from such breach. How

such a practice can be supposed to affect the contractual relations of merchant and shipowner I am wholly at a loss to understand; or how the generality of such a practice could alter the legal rights of the parties more than a single example, it is equally difficult to discover. Every carrier by land, as by water, when he breaks his contract and causes damage thereby is liable to be called upon to make good the damage, but how such a liability and constant submission to damages for such liability can license the supposed breach is a problem that has never been solved.

I have had some difficulty in understanding the suggestion that the cause of damage was too remote to give rise to the claim now made. I could imagine a state of facts in which, though I should not agree with it, the argument would be intelligible; in this case it is hardly susceptible of plausible statement. The jettison of this cargo was the direct result of its being stowed upon deck.

I am therefore of opinion that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, in this case I have had considerable difficulty in understanding what the ground was upon which Cave J. decided below; but upon the best consideration which I can give to it, I think that there has been a misapprehension upon his part and that really the point which in his imagination had arisen did not arise. Upon the facts it appears, as the noble and learned Lord, the Lord Chancellor, has just stated, that the case really comes to be this: the goods were shipped on board, and, probably with the knowledge, or at least without any objection on the part of the shippers, were put on the deck, on which they ought not to have been put. That being so, I quite agree that the judgment of the Court of Appeal is right.

LORD WATSON:—

My Lords, notwithstanding the able argument addressed to us on behalf of the appellants, I have come without difficulty to

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the conclusion that the judgment of the Court of Appeal is right.

The appellants did not maintain that they had established a proper mercantile custom, which, if not excluded by the terms of the bills of lading, would become an implied term of the contracts thereby constituted. But it was said that a practice had been admitted by the respondents which was described as "a practice to carry goods on deck from New Orleans to Liverpool, at the risk of the shipowner." From an examination of the statements and concessions mutually made in the course of the trial before Cave J. I am satisfied that the only practice ultimately alleged by the appellants and admitted by the respondents was in substance this,—that owners of vessels trading between New Orleans and Liverpool were in the habit of stowing goods on deck, in violation of their contract with the shipper, they accepting full responsibility for the consequences.

Such being the state of the facts, it appears to me to be absolutely immaterial, so far as concerns the liability of the shipowner, whether the shipper knew or was justifiably ignorant of the practice. Shippers who are aware of the existence of such a practice, and do not object to it, cannot be said to have consented to a modification of the contract embodied in their bills of lading. Their non-interference merely implies that they do not think it necessary to prevent a deviation from the contract, because they are satisfied of the shipowner's ability to make good all loss arising from his having broken it. In short, the liability of the shipowner, upon each occasion of deck stowage under the admitted practice, is precisely the same with the liability which he would incur, in the absence of any such practice, by stowing goods on deck, on one occasion, in violation of his contract to carry, and without the knowledge of the shipper.

An interesting argument was addressed to your Lordships by the appellants' counsel, as to the extent to which the law of England admits claims for contribution in respect of deck cargo properly jettisoned; and all the authorities, from *Milward* v. *Hibbert* (1) to *Burton* v. *English* (2) were referred to and criticised. In the view which I take of the real character of the practice

(1) 3 Q. B. 120. (2) 12 Q. B. D. 218.

upon which the appellants rely, neither that argument nor the authorities cited in the course of it have any bearing upon this case. It was admitted that the general rule of law excludes such claim of contribution; and it was not seriously disputed that the decisions which establish certain exceptions from that rule either affirm or assume that the jettison of goods placed on the deck of a seagoing vessel, not under contract express or implied with the shipper, but by the act of the shipowner, and at his risk, cannot give rise to any claim of average, whether general or particular. To admit an exception in that case would be tantamount to an abolition of the general rule.

Of the 125 bales of the respondents' cotton which were stowed on the deck of the *Egyptian Monarch* by the appellants, 100 bales were carried under bills of lading which bore that the cotton was "under deck," and twenty-five bales under a bill of lading in which the same condition of stowage was implied. Accordingly, at the time when jettison was made of those 125 bales, they were being carried in breach of the contract, and were not within the exceptions specified in the bills of lading, which have exclusive reference to goods safely stowed under hatches. In these circumstances I cannot doubt that the appellants are liable to pay to the respondents the value of the 125 bales, seeing that they cannot make delivery in terms of their contract, and have no legal excuse for their failure to deliver.

It was argued that the actual cause of damage was too remote to found any claim against the appellants; but that argument appears to me to be at variance with the principles laid down by Tindal C.J. in *Davis* v. *Garrett* (1) which have been recognised and acted upon in subsequent decisions. It was also argued that the respondents were not entitled to recover the full value of the cotton, because, if all the cargo had been below deck, it would have been necessary to jettison part of it, and consequently these 125 bales would have been liable in a sum by way of general average contribution which ought to be deducted in calculating damages for the purposes of this suit. Whether the appellants could have made out such a defence it is, in my opinion, unnecessary to consider. It is not even indicated in the pleadings, and

(1) 6 Bing. 716.

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the evidence before us affords no materials for raising or disposing of any such question.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 7th December 1886.

Solicitors for appellants: *McDiarmid & Teather.*

Solicitors for respondents: *Gregory, Rowcliffes & Co.*, for *Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (I.) 1886 *Dec.* 7.

DEERING AND OTHERS . . . . . APPELLANTS;

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND . . . } RESPONDENTS.

Bankruptcy—Secured Creditor—Mortgage of Policy of Insurance—Covenant to pay Premiums—Proof of Debt—Valuing Security—Value of Covenant to pay Premiums—Proof in addition—Bankruptcy (Ireland) Amendment Act 1872 (35 & 36 *Vict. c.* 58) *s.* 47.

The holder of a policy of insurance on his own life mortgaged it as security for a debt and covenanted with the mortgagees to pay the annual premiums. The mortgagor having become bankrupt the mortgagees valued the policy and proved in the Irish Court of Bankruptcy for the difference between that value and the debt, as provided by the Bankruptcy (Ireland) Amendment Act 1872 (35 & 36 Vict. c. 58):—

Held, reversing the decision of the Irish Court of Appeal (*In re Killen*, Ir. Law Rep. 15 Ch. 388), that the mortgagees were not entitled under sect. 47 to prove in addition for the value of the covenant to pay premiums.

APPEAL from a decision of the Court of Appeal (Ireland) (1).

By an indenture of mortgage dated the 23rd of December 1880 Arthur Killen assigned to the Governor and Company of the Bank of Ireland a policy of assurance on his life for £1000 subject to the annual premium of £39 13*s.* 4*d.*, as security for debts then or to become due, and covenanted with the Governor and Company, their successors and assigns, (inter alia) to pay during the

(1) *In re Killen*, Ir. Law Rep. 15 Ch. 388.

assignment the annual premiums and to do all other acts necessary for keeping the policy on foot.

On the 19th of February 1884 Killen was adjudicated a bankrupt, being then indebted to the bank in the sum of £982 19*s.* 8*d.* for which they held as security the policy of assurance and a lease of premises.

The bank valued these two securities together at £350, and were admitted to prove as unsecured creditors in the bankruptcy for the difference between that sum and £982 19*s.* 8*d.*, without prejudice to their right to claim for the value of their interest under the bankrupt's covenant to pay premiums.

It appeared in the course of the proceedings that the surrender value of the policy was £185. The value of the covenant to pay premiums having been estimated by an actuary at £407 16*s.*, the Court of Bankruptcy declared that to be the value, and admitted the bank to prove for that sum in addition to their former proof.

On appeal the Irish Court of Appeal [FitzGibbon and Barry L.JJ., Porter M.R. dissenting] affirmed this decision, with a proviso that the bank should independently of their right to interest, if any, subsequent to the bankruptcy, in no case receive by way of dividend any greater sum than together with all other moneys paid to them on foot of the principal should amount to 20*s.* in the pound on their debt.

From this decision the official assignees and the creditors' assignee appealed.

Nov. 16, 18. *Madden* Q.C. (of the Irish Bar) for the appellants :—

The question is whether the mortgagee of a policy of insurance, upon the bankruptcy of the mortgagor, besides realising the value of the policy and proving for the balance of his debt (which he is clearly entitled to do) is also entitled to prove upon the covenant to pay the premiums. The appellants contend that this is a double proof. A secured creditor is defined by the Bankruptcy (Ireland) Amendment Act 1872 (35 & 36 Vict. c. 58) sect. 4, as "any creditor holding any mortgage, charge, or lien on the debtor's estate, or any part thereof, as security for a debt due to him."

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The rights of a secured creditor depend upon sect. 63 and the Irish General Orders 1872, rules 85–89 (printed in Kisbey on Bankruptcy), which are substantially the same as the English General Orders. The result is, that any balance realised by the security over the assessed value must be handed over to the trustee: *Ex parte King* (1); *Société Générale de Paris* v. *Geen* (2).

Such a covenant as this was not a "liability to pay money upon a contingency," within the Bankruptcy Act 1849 (12 & 13 Vict. c. 106) sect. 178: *Warburg* v. *Tucker* (3); *Mitcalfe* v. *Hanson* (4). Nor was it a debt payable upon a contingency within sect. 177 of that Act: *Warburg* v. *Tucker* (5). In an action on such a covenant the plaintiff cannot recover more damages than the actual loss sustained: *National Insurance &c. Association* v. *Best* (6).

The measure of damages clearly cannot be the amount of premiums calculated as an annuity, which was the principle adopted in the present case. The principal being gone, the accessory goes too. These covenants are directly dealt with by sect 47 of the Irish Bankruptcy Act 1872 (7) which was copied from sect 154 of the English Bankruptcy Act 1861. To bring himself within that section a creditor must shew that he has an interest in the contract. If he has surrendered the policy what interest has he in the contract? The principle is the same if instead of surrendering he assesses the security. The trustee has

(1) Law Rep. 20 Eq. 273.
(2) 8 App. Cas. 606, 617, 618.
(3) E. B. & E. 914, 926.
(4) Law Rep. 1 H. L. 242.
(5) 5 E. & B. 384.
(6) 2 H. & N. 605, 614.
(7) Sect. 47. "If any bankrupt, at the time of adjudication, or any arranging debtor, at the time of the presentation of his petition, be liable, by reason of any contract or promise, to pay premiums on any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained and to receive dividends thereon."

Sect. 63. "A secured creditor shall for the purpose of voting at any meeting of creditors in any arrangement or in any composition after bankruptcy under the said Act or this Act, be deemed to be a creditor only in respect of the balance (if any) due to him, after deducting the value of his security; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. He may, however, at or previously to any such meeting, give up the security, and thereupon he shall rank as a creditor in respect of the whole sum due to him."

the power of insisting upon realisation. The Court below seem to have relied upon the decision (14 Jan. 1876) in *In re N. Law, Ex parte Bank of Ireland* (1), as if it were based upon a practice in the Court of Bankruptcy, which it was not. The statute in fact requires that the policy shall either be sold or be deemed to have been sold. The fallacy of the decision below is in holding that when the policy is surrendered the covenant is still valuable.

T. P. Law Q.C. for the respondents:—

The practice in Irish bankruptcy has been to allow the proof now in question, though no record of any litigated case has been found. The statute itself in sect. 47 fixes the point of time which is to give right to a proof: namely the adjudication in bankruptcy. That is the time at which the creditor's rights are to be ascertained. At that time the covenant is clearly in force and of some value. This class of covenant is ancillary, not to the debt (as put contrà) but to the security: *Lyde* v. *Mynn* (2); and does not fall with the principal: *Robinson* v. *Ommanney* (3). The origin of sect 47 was owing to the decisions upon sect. 178 of the English Bankruptcy Act of 1849: *Warburg* v. *Tucker* (4), and *Mitcalfe* v. *Hanson* (5), where it was held that the bankrupt was not discharged from such a covenant by the bankruptcy. Sect. 47 was passed in order to relieve the bankrupt. The present claim is distinctly within that section. The creditor has "an interest in the contract," namely an interest to be paid 20*s.* in the pound. At the time of the adjudication here there had been no breach of the covenant to pay the premiums; nor had there at the time of the respondents' application. At that time the policy was in existence, and the covenant also, and that is the point of time at which the respondents' rights ought to be ascertained. The holder of a bill given as security for a debt is entitled to prove for the full amount of the bill, though he cannot receive more than 20*s.* in the pound on the debt: *Ex parte Newton* (6). The same principle applies here.

Madden Q.C. replied.

(1) 10 Irish Law Times, p. 11.
(2) 1 My. & K. 683.
(3) 21 Ch. D. 781; 23 Ch. D. 285.
(4) E. B. & E. 914.
(5) Law Rep. 1 H. L. 242.
(6) 16 Ch. D. 330.

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The House took time for consideration.

Dec. 7. LORD WATSON:—

My Lords, before the Bankruptcy (Ireland) Act 1872 came into operation, the statute law of Ireland with regard to the rights and remedies of secured creditors in bankruptcy was identical with the law established in England by the Consolidation Act of 1849.

It has been authoritatively settled, under the English statute, that a covenant by a debtor to pay the annual premiums necessary in order to keep up a life policy which he had assigned in security for a debt did not fall within his bankruptcy, inasmuch as his liability on such a covenant was not a contingent liability within the meaning of sect. 178, and, consequently, that the bankrupt's certificate did not afford a good defence to the creditor's demand for performance. It was so held by the Court of Exchequer Chamber in *Warburg* v. *Tucker* (1); and that decision was approved and followed by this House in *Metcalfe* v. *Hanson* (2). The ratio of these decisions equally applies to a covenant by the bankrupt to pay premiums on a policy belonging to a third party. It is necessary to observe that in neither case did it appear that the secured creditor had proved his debt (after valuing and deducting his security) in the bankruptcy; and in *Warburg* v. *Tucker* (1) Lord Bramwell, who concurred in the judgment, expressed an opinion that, if the creditor had done so, he would not have been entitled to enforce the collateral contract to pay premiums against the bankrupt. That point does not appear to me to have been decided, either directly or by implication; but what was actually decided is not, in my opinion, any authority for the proposition that, as the law stood in Ireland before the Act of 1872, a secured creditor had the right to prove and draw dividends, and also to sue the bankrupt for performance of his engagement to keep alive the policy assigned in security.

The Act of 1872 made an important alteration in the law of Ireland, which had previously been effected in England by the Bankruptcy Act of 1861. Sect. 47 of the Irish Act, which

(1) E. B. & E. 914. (2) Law Rep. 1 H. L. 242.

corresponds with sect. 154 of the English statute, provides that, if the bankrupt, at the time of adjudication, be liable, by reason of any contract or promise, to pay premiums on a policy, or any other sums of money, whether yearly or otherwise, or to repay or indemnify any person against such payments, the person entitled to the benefit of such contract or promise may, if he thinks fit, apply to the Court to set a value on his interest, and the Court is required to ascertain the value and to admit the creditor to prove the amount so ascertained, and to receive dividends thereon.

If a bankrupt has contracted to pay premiums upon a policy of insurance belonging to a third party, it is clear that, in terms of sect. 47, the creditor is entitled to prove the value of the obligation, as fixed by the Court, and to receive dividends thereon. In that case the liability is simply an existing debt solvendum de futuro; and it would be difficult to suggest any reason why the creditor in such a debt ought not to rank pari passu along with the ordinary creditors of the bankrupt, in the same way as a creditor for an annuity. Sect. 47 makes provision for estimating the amount of the debt, which is not susceptible of precise calculation, seeing that it depends upon the uncertain event of the death of the insured.

The respondents have, in compliance with the general orders framed under the provisions of sect. 124 of the Act of 1872, put a value upon the mortgaged policy, and have proved for the balance of their debt after deducting that value. They also assert their right to prove, and the Courts below have admitted them to prove, the value of the bankrupt's covenant to pay premiums upon the mortgaged policy, which has been fixed at £407 16*s.* by the Court, in accordance with the provisions of sect. 47.

It was argued for the respondents that the legislature, in depriving them of their right to proceed against the bankrupt, upon his personal covenant, must necessarily have intended to give them an equivalent in the shape of an absolute right to prove in the bankruptcy for the value of the liability. I venture to doubt whether the assumption of right upon which the argument proceeds is well founded. The respondents did not produce

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any authority for saying that, before the Act of 1872, they would have had the right to value and deduct their security and prove for the unsecured balance of their debt, and then to sue the bankrupt upon his covenant to pay premiums. I am by no means satisfied that they could have done so; but it is unnecessary to decide the point, because this case must be decided under the bankruptcy law as established by the Act of 1872; and I am of opinion that under that law the respondents' claim cannot be maintained.

The bankrupt's covenant to pay premiums, which is a personal obligation to make the security effectual, might in ordinary language be correctly described as an incident, or as part of the security. But it is not part of the security within the meaning of the Act of 1872. By sect. 4 a "secured creditor" is defined to be a creditor "holding any mortgage, charge or lien on the debtor's estate, or any part thereof, as security for a debt due to him." These words by plain implication, define, for the purposes of the Act, the meaning of "a security" as well as of a "secured creditor" and they exclude a personal obligation to make a security effectual, just as they exclude a personal obligation to give a security. It therefore appears to me that, in valuing their security for the purpose of proving the balance of their debt, the respondents were neither bound nor entitled to include in the valuation the estimated value of the personal covenant, and they have not done so.

The substance of the respondents' claim upon the covenant in question is to have part of the fund available for distribution among ordinary, as distinguished from preferable and secured creditors of the bankrupt, set aside in order to constitute and be available as a security for their debt. It is, to my mind, a startling proposition that a creditor who is permitted to prove the balance of his debt against that fund, and to receive dividends from it, on the footing that such balance is unsecured, has also the right to draw from the same fund a sum, which he can only claim as an equivalent for the security which he has lost through the bankrupt's failure to perform his personal covenant. The provisions of sect. 47 with respect to covenants and promises to pay premiums of insurance are, no doubt, expressed in very general terms; but

whilst they obviously apply to cases where the bankrupt's liability is of the nature of a proper debt, I cannot conceive that the legislature intended to enable a creditor in the position of the respondents to rank with ordinary creditors not only for the unsecured balance of his debt, but for a sum representing a security for that unsecured balance.

I am confirmed in that opinion by a reference to the general scheme established by the Act of 1872, and relative statutory rules for disposing of the claims of secured creditors. If he desires to prove against the estate, the creditor must value his security as defined in the Act, that being in the present case the policy of insurance, without the personal covenant to pay premiums. If not satisfied with his valuation, the general body of creditors or their representatives may insist on the security being realized. The amount of the valuation or the realized proceeds, as the case may be, is then deducted from the debt, and the creditor admitted to prove the balance. In my opinion, the footing upon which that deduction is made and proof of the balance allowed is this, that the security is either realized or deemed to be realized, and the proceeds of realization or the creditors' valuation paid or imputed in payment pro tanto of his debt. So far as concerns the proceedings in bankruptcy, the security is dealt with as having been realized and paid to the creditor, and his debt to the extent of its valuation or actual proceeds is extinguished, the balance unpaid being then treated as unsecured, and therefore admitted to proof.

Such being, according to my view, the plain import of the statute and rules, to give effect to the respondents' claim would be utterly inconsistent with the scheme which they enact. To do so would, in effect, be to enforce the maintenance of a policy which has been realized and imputed in payment of the debt, in order to create a security for a balance which must be treated as unsecured.

For these reasons, I am of opinion that the order of the Court of Appeal must be reversed, and the order of the judge in bankruptcy admitting the proof discharged; and that the appellants ought to have their costs in the Courts below as well as in this House, and I move accordingly.

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LORD BLACKBURN :—

My Lords, in this case the decision turns upon the true construction of a few words in sect. 47 of an Act of Parliament (the Bankruptcy (Ireland) Amendment Act 1872), and I can only say that they seem to me very obscure; but I have perused my noble and learned friend's judgment and considered it, and I have come to the conclusion that the decision of the Court below cannot be supported and should be reversed.

LORD HALSBURY L.C. :—

My Lords, I concur in the judgment which has been moved, and in the reasons which have been given by my noble and learned friend. I desire to rest my opinion upon the reasoning of the Master of the Rolls in Ireland. I only wish to add that it would be a strange result if in that country a bankruptcy creditor should be permitted to prove and establish his right to more than twenty shillings in the pound.

It is true that the Court of Appeal made an order that the creditor should not get more than his twenty shillings in the pound, but it seems to me that that order, though it may prevent the actual injustice which such a state of things would cause, does not cure the vice of the reasoning which would lead to such a result. The fact that but for such order he might get more than twenty shillings in the pound seems to me to be a very cogent argument against the respondents' contention.

Order appealed from reversed; Order admitting the respondents to the second proof discharged; the respondents to pay the costs in the Courts below and in this House; the matter remitted to the Court of Bankruptcy in Ireland.

Lords' Journals 7th December 1886.

Solicitor for appellants: *Frith Needham for J. H. Moore & B. Thompson,* Dublin.

Solicitors for respondents: *Freshfields & Williams for E. H. De Moleyns,* Dublin.

[HOUSE OF LORDS.]

THE BRADFORD BANKING CO., LIMITED Appellants; H. L. (E.) 1886 Dec. 7.

AND

HENRY BRIGGS, SON & CO., LIMITED . Respondents.

Company— Shares— Equitable Mortgage—Priority—Deposit of Certificate of Shares—Articles of Association—Lien of Company on Shares for Money due from Shareholders—Notice of Trust—Companies Act 1862 (25 & 26 *Vict. c.* 89) *s.* 30.

The articles of association of a company registered under the Companies Act 1862 provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association:—

Held, reversing the decision of the Court of Appeal (31 Ch. D. 19) and restoring the judgment of Field J. (29 Ch. D. 149), that the company could not in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank claim priority over advances by the bank made after such notice, but that the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514) applied.

Held also, reversing the decision of the Court of Appeal, that the notice to the company of the deposit with the bank was not a notice of a trust within the meaning of the Companies Act 1862 (25 & 26 Vict. c. 89), s. 30, and that the bank by giving notice of the deposit did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders with notice of the interest of the bank.

Appeal from a decision of the Court of Appeal (Brett M.R. Baggallay and Fry L.JJ.) (1) reversing a judgment of Field J. (sitting in the Chancery Division). The facts are set out in the report of the judgment of Field J. (2) For the present purpose the statement in the judgment of Lord Blackburn will suffice.

1886. June 22, 24. *Rigby* Q.C. and *G. Farwell* for the appellants:—

The question is whether as the appellants contend this case is

(1) 31 Ch. D. 19. (2) 29 Ch. D. 149.

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governed by *Hopkinson* v. *Rolt* (1). The deposit of share certificates was accompanied in each case by a deed of charge in favour of the appellants in the form common in such cases, and notice of the deposit was given by the appellants' solicitors to the respondents. For the debts due to the respondents before such notices it is admitted that they have priority over the appellants; but that they have not for advances subsequent to such notices is decided by *Hopkinson* v. *Rolt* (1). The Companies Act 1862 (25 & 26 Vict. c. 89) s. 30 no doubt says that the company shall take no notice of trusts, but that cannot operate to enable the company, if they take up the position of mortgagees, to get rid of all the obligations and conditions which attach to mortgagees. If such a clause as 103 can have the effect given to it by the Court of Appeal it will effectually prevent shareholders in such companies from borrowing moneys, because although they may not be indebted to the company at the moment of the proposed loan no one will lend money if it is to be postponed to subsequent advances by or debts to the company itself. A similar question was raised before North J. in *Miles* v. *New Zealand Alford Estate Co.* (2) The reasoning of Lord Esher in the Court below is identical with the unsuccessful argument in *Hopkinson* v. *Rolt* (1). It is said that clause 103 shews an intention to contract that the doctrine of *Hopkinson* v. *Rolt* (1) shall not apply; if so very inappropriate words have been used. The words are similar to—certainly not wider than —the provision in that case for securing a current account. The principle of that case is that the first mortgagee is secure as to past advances: if after notice of the second mortgage he chooses to make fresh advances he does so at his peril. See also *London and County Banking Co.* v. *Ratcliffe* (3).

Cozens-Hardy Q.C. and *L. T. Dibdin* for the respondents:—

Hopkinson v. *Rolt* (1) has no bearing upon the question. The shareholder cannot by any proceeding or device alter the nature of the property or derogate from the rights created therein at the time when the property itself was created. The appellants'

(1) 9 H. L. C. 514. (2) 32 Ch. D. 266.
(3) 6 App. Cas. 722.

claim does derogate from and is inconsistent with such rights. That such rights might exist so as to prevent such a claim as the appellants from arising is admitted in the judgments in *Hopkinson* v. *Rolt* (1): see also per Lord Romilly M.R. in *Menzies* v. *Lightfoot* (2). The language of the contract here is not the same as in *Hopkinson* v. *Rolt* (1). The bargain is that the company shall have a *first* lien. The appellants' contention strikes out the word "first." But the lien is not only first, it is "permanent;" i.e. it extends to all advances at any time. No dealings with third parties can affect this contract: *In re Angelo* (3). Sect. 30 of the Companies Act 1862 makes the notices given by the appellants ineffectual for the purpose of giving priority to the appellants' advances. The judgment of Lord Selborne in *Société Générale* v. *Walker* (4) is in favour of the respondents and the judgment of the Court of Appeal in that case is conclusive in their favour.

[LORD BLACKBURN referred to *Ex parte Agra Bank* (5).]

Sect. 30 of the Companies Act 1862 is intended to prevent any notice of trust being given to a company at all, so as to affect the company in any way.

Farwell replied.

The House took time for consideration.

Dec. 7. LORD HALSBURY L.C.:—

My Lords I have had an opportunity of considering the reasons of the noble and learned Lord (Lord Blackburn) for the view he entertains, and in which I concur, that the judgment of the Court of Appeal should be reversed and the judgment of Field J. restored. Nor should I desire to add anything to what he is about to urge but that I see some reference to the words of a noble and learned Lord (Lord Selborne) with respect to the proposition that sect. 30 of the Companies Act renders it impossible for any company to be affected by notice of any trust, expressed, implied, or constructive.

(1) 9 H. L. C. 514.
(2) Law Rep. 11 Eq. 459, 465.
(3) 5 De G. & Sm. 278.
(4) 14 Q. B. D. 424; 11 App. Cas. 20, 30.
(5) Law Rep. 3 Ch. 555.

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Lord Halsbury, L.C.

I was a party to the judgment of your Lordships' House in the case to which reference is made (1), and I certainly never imagined myself to be agreeing to a decision which could establish any such proposition, and the noble and learned Lord in whose words I have expressed my concurrence gave no such reasons for his judgment. No such proposition was necessary for the decision of the case, and I wish to guard myself on the present occasion from being supposed to have so held.

The words occur not only in the Companies Act, sect. 30, but also in sect. 83 of the Land Transfer Act 1875, and if what is suggested as the true interpretation of those words were to be so determined by your Lordships' House it would come to this, that whenever the conduct of the parties to a dealing in land had been such that a Court of Equity would imply a trust, the operation of those words would be such as to shield the person registering from the jurisdiction of a Court of Equity in respect of the lands so registered, though but for that section he would have been held by a Court of Equity to be merely a trustee. So startling a result ought not to be arrived at without direct decision and, as I have already said, I do not understand your Lordships ever to have decided it.

I concur however in the conclusion to which the noble and learned Lord has arrived and in the reasons upon which it is founded.

LORD BLACKBURN:—

My Lords, this is an appeal against the following order of the Court of Appeal (England) dated the 14th of July 1885:—"Upon motion this day made unto this Court by counsel for the defendants Henry Briggs, Son & Co. Limited, by way of appeal from the judgment dated the 13th of March 1885, and upon hearing counsel for the plaintiffs, and upon reading the said judgment, this Court doth order that the said judgment dated the 13th of March 1885 be reversed. And it is ordered and adjudged that this action do stand dismissed as against the defendants Henry Briggs, Son & Co. Limited. And it is ordered that the plaintiffs, the Bradford Banking Company Limited, do

(1) 11 App. Cas. 20.

pay to the defendants, Henry Briggs, Son & Co. Limited, their costs of this action and occasioned by the said appeal, such costs to be taxed by the taxing master."

In order to understand the points of law involved in this appeal and the judgment of the 13th of March 1885, a little statement is necessary.

The respondent company is a trading company limited by shares and incorporated under the Companies Act 1862, for the purpose of carrying on the business of a colliery. It has articles of association which exclude the regulations contained in the First Schedule Table A to the Companies Act 1862, and those articles of association were duly registered.

The Companies Act 1862 sect. 16 enacts that when registered the articles shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations in such articles.

The only one of the articles of association which I think it material to notice is the 103rd article, which is as follows:— "The company shall have a first and permanent lien and charge, available at law and in equity, upon every share of every person who is the holder or one of several joint holders thereof, for all debts due from him, either alone or jointly with any other person, whether a shareholder or not in the company."

John Faint Easby, a coal merchant, became a proprietor of a number of shares in the respondent company, and obtained certificates for them. This property in the shares was, by virtue of the 16th section of the Act already quoted, I think, bound to the company as much as if he had (at the time he became holder of these shares) executed a covenant to the company in the same terms as article 103, but I do not think it was bound any further.

John Faint Easby filed a petition for liquidation on the 31st of December 1883, being then indebted to the company. He had been a customer of the respondent company, and owed them a considerable sum at that date. He still continued the registered holder of the shares, and, if there had been no more in the

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case, it is not now at least disputed that the respondent company would have had a first lien on the shares. But Easby was a customer of the Bradford Banking Company, the now appellants, and in November 1879 he deposited, amongst other things, the certificates of 120 shares in the respondent company, and the appellant company, by their solicitors, sent in duplicate the following notice:—"For and on behalf of the Bradford Banking Company, we do hereby give you notice that John Faint Easby, of Albert Place, Bradford, in the county of York, coal merchant, has deposited with the said company certificates for sixty £15 shares, Nos. 6629 to 6678, both inclusive, No. 7790 and Nos. 10,998 to 11,006, both inclusive, in Henry Briggs, Son & Co., Limited, also for sixty B shares, Nos. 1908 to 1967, both inclusive, in the same company, for securing the repayment of all moneys or balances due or to become due to the said company from the said John Faint Easby, either alone or together with any other person or persons.—Dated the 6th day of November 1879.—Gardiner and Jeffery, solicitors or agents for the said banking company.—Mr. John Henry Phillips, secretary to Henry Briggs, Son & Co., Limited, Whitwood and Methley Collieries, near Leeds."—Endorsement.—"Notice of the above mentioned deposit lodged with Henry Briggs, Son & Co., Limited, this 15th day of November 1879.—John H. Phillips, Secretary." One copy was returned with the indorsement on it; the other was retained by the secretary.

On the 20th of June 1881, there was a further deposit of certificates, and these letters were sent:—"Sir,—20th June 1881.—We hereby give you notice that Mr. John Faint Easby, of Oakroyd Terrace, Bradford, coal merchant, has deposited with this company the following certificates, viz. (stating the numbers), in Henry Briggs, Son & Co., Limited, for securing the repayment of all moneys or balances due or to become due to us from him either alone or together with any other person or persons.—We are, Sir, your obedient servants, Joseph Crofts, sub-manager.—Please own receipt.—The Secretary, H. Briggs, Son & Co., Limited." "Whitwood Collieries, Normanton.—22nd June 1881.—Sir, We are in receipt of your favour of the 20th instant, informing us that Mr. J. F. Easby has deposited with your bank certain certificates of shares in our company. We think it right to inform you that

Mr. Easby is indebted to us, and that, under a clause of our articles of association we have a first and permanent lien upon all shares held by him.—Yours faithfully, John H. Phillips, Secretary.—The Manager, the Bradford Banking Company, Limited."

I think it would only complicate the matter to make in detail a similar statement as to the shares of William Fletcher.

The action was brought by the Bradford Banking Company claiming to have: 1. An account taken of what is due to them for principal, interest, and costs on their said securities, and to have their said securities realized by foreclosure and sale. 2. A declaration that their said securities have priority over all lien (if any) of the defendant company (the respondents) on the said shares created by their articles of association or otherwise.

The points of law were argued on the admissions in the pleadings, and on admissions made by counsel at the bar and embodied in the judgment of Field J. The important admission, as far as regards Easby's shares, was that the account of John Faint Easby with the plaintiffs was closed in June 1881 (which involves an admission that all the advances in respect of which the plaintiffs sue were made before that date), and that all moneys owing by him to the defendants when the said account was so closed have since been paid. This at once raised the question whether the plaintiffs, as pledgees of Easby's interest in the shares, had priority for advances over debts which were contracted after notice of that pledge, though the lien was claimed by virtue of a contract made at the very time when the shares were first acquired by Easby, and consequently before the shares could be pledged by Easby to the appellants or any one else.

Field J. thought the point concluded by the decision of this House in *Hopkinson* v. *Rolt* (1). It was argued that the terms of the article 103 here prevented the application of that case. Field J. did not put such a construction on the article. He says, "The company had a first charge upon the shares for any debts which should become due to them by the shareholder, but after that charge had been created, and before any of the debts now sought to be recovered by the company were incurred, the shareholder exercised his right of borrowing money upon the shares

(1) 9 H. L. C. 514.

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by means of an absolute charge upon them to the bank. The company had notice of that charge, and I think that from that time they had no power to make advances to the shareholders, so as to rank in priority to the debts due to the bank."

The Master of the Rolls (Lord Esher) and Baggallay L.J., both express an opinion that inasmuch as the article 103 stipulated for a "first and permanent" lien, the decision of this House in *Hopkinson* v. *Rolt* (1) did not apply. Fry L.J. did not go so far as to dissent from their opinion, but he certainly did not rest his judgment on that ground.

As I understand it, the principle of *Hopkinson* v. *Rolt* (2) is explained by Lord Campbell then Lord Chancellor, and it is this:—The owner of property does not, by making a pledge or mortgage of it, cease to be owner of it any further than is necessary to give effect to the security which he has thus created. And if the security is, as that in *Hopkinson* v. *Rolt* (1) was, a security for present and also for future advances, the pledgee or mortgagee, though not bound to make fresh advances, may, if he pleases, do so, and will, if the property at the time of the further advance remains that of the pledgor, have the security of that property.

But the mortgagor (unless there is something to make it against conscience in him to do so) may cease to take further advances from the first mortgagee, and borrow money from anyone else ready to lend it on the security of that property remaining in him not already pledged to the first, subject to the priority of the first pledgee for advances made or begun to be made. The first mortgagee is entitled to act on the supposition that the pledgor who was owner of the whole property when he executed the first mortgage continued so, and that there has been no such second mortgage or pledge until he has notice of something to shew him that there has been such a second mortgage, but as soon as he is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor, he cannot make a new advance in priority to that of which he has notice. As Lord Campbell says, "the hardship upon the bankers from this view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a

(1) 9 H. L. C. 514. (2) 9 H. L. C. 534-536.

second." It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor.

Lord Cranworth thought that it had been established for a long time by the Courts of Equity that, under such circumstances, the general rule of equity was to postpone the second mortgage to advances made by the first mortgagee after notice of the second, if the original mortgage was prior in time to the second. He says, I think very truly, that if such was the established and known rule in equity, there could be no injustice in enforcing it. But the majority of this House held that such was not the established and known rule of equity. And I think it was not questioned by any one that the decision of the majority in *Hopkinson* v. *Rolt* (1) finally decided that point.

I cannot assent to what I understand to be the reasoning of the Master of the Rolls and Baggallay L.J. in the construction of the 103rd article. I do not see that the words "first and permanent lien" differ from "lien," or at least that they make it in any way unconscientious or unjust in the owner of the property pledged, to obtain a further advance from a second pledgee who knows of the first pledge, though that second pledgee, for his own sake, must take care to give notice of his security to the first pledgee.

The Master of the Rolls says that the plaintiffs, when the shares were deposited with them, knew, or at least ought to have known, what the articles were, and I so far agree with him. But he adds, "that is to say, the plaintiffs made their advances with the knowledge of this, that those who deposited the shares with them had contracted with the company that, notwithstanding any deposit of the shares with the plaintiffs, the company should have in equity the first lien and charge." I cannot agree that such is the true construction of art. 103.

This brings me to the second point on which all three judges in the Court of Appeal agreed. The Companies Act 1862 s. 30 is in the following terms:—"No notice of any trust, expressed, implied, or constructive, shall be entered on the register or be

(1) 9 H. L. C. 514.

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receivable by the registrar in the case of companies under this Act and registered in England or Ireland." The effect of that section was much discussed in a case of *Société Générale de Paris* v. *Tramways Union Company* (1) decided by the Court of Appeal on the 18th of December 1884. And of that decision the judges in the present case were aware. It was affirmed in this House under the name *Société Générale de Paris* v. *Walker* (2), not entirely for the same reasons, on the 17th of December 1885. The judges in the present case deciding, as they did, on the 14th of July 1885, could not know of that latter decision.

I think that in order to bring this case within the principle of *Hopkinson* v. *Rolt* (3), it is not necessary to establish any trust as against the company. It is, I think, enough to shew that the company, a trading one, had by its agents who managed its trading transactions such knowledge that their customer Easby had ceased to be the owner of the shares as would have made it unjust to allow him credit on the faith of that property, which had once been his, but which he had parted with before they were asked to allow him to incur the debt for which they now seek priority.

The legislature are competent to enact that a trading company of this sort should have the right to disregard the ordinary rules of justice, and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the company, but I do not think it possible to construe sect. 30 as an enactment to that effect. Lord Selborne in *Société Générale de Paris* v. *Walker* (2), said, "I think that according to the true and proper construction of the Companies Act 1862 and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust." I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them, in their capacity of traders, with knowledge of their (the appellants') interest.

(1) 14 Q. B. D. 424. (2) 11 App. Cas. 20.
(3) 9 H. L. C. 514.

I think, therefore, that the order appealed against was wrong, and should be reversed; and that the judgment of the 13th of March 1885 should be restored; and that the respondents should pay to the appellants their costs, both in the Court of Appeal and in this House.

LORD FITZGERALD:—

My Lords, I concur in the result at which my noble and learned friend has arrived. He has stated the facts so fully that it is unnecessary to recapitulate them. I may however observe in reference to the certificates of the shares which Lord Selborne in *Société Générale* v. *Walker* (1) states to be "the proper (and indeed the only) documentary evidences of title in the possession of a shareholder," that though in the present instance they are expressed to be "subject to the articles of association," yet they do not contain any intimation that the holder is not at liberty to pledge, or mortgage, or otherwise to raise money or obtain credit on the deposit of the certificates, and seem to have been issued in this, as in other like cases, to the shareholder "as evidence of his title" to enable him to deal with them as he would with other property, but subject to the articles of association. The House lately gave large effect to the possession of the certificates of shares in the *Colonial Bank* v. *Whinney* (2) in holding that where the shareholder pledged the certificates of his shares to the bank as a security for advances, though no notice of the pledge had been given to the company, yet that by the pledge of the certificates the shares ceased to be in his order and disposition and did not pass to his assignees in bankruptcy, although his name remained on the register as the registered shareholder.

I concur in opinion with my noble and learned friend that the principle of *Hopkinson* v. *Rolt* (3) governs the present case unless there is something in art. 103 which prevents its application. The articles of association provide for the transfer of shares and the registration of the instrument of transfer, and confer on the directors authority to disapprove of the transferee, but there is no limit to the right of the shareholder to pledge or raise money

(1) 11 App. Cas. 20. (2) 11 App. Cas. 426.
(3) 9 H. L. C. 514.

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on his shares, unless it is to be found in art. 103. I concur in the interpretation put on that article by Field J. and by my noble and learned friend. Full effect may be given to its terms, and yet the lien conferred by it be limited to liabilities of the shareholder contracted up to the time at which the company shall have had notice that he has ceased to be the beneficial holder of the share. The view taken by the majority of the Court of Appeal would necessarily render such shares practically unavailable as a security for advances other than those made by the company.

The judgment of Fry L.J. rests on the point arising on the 30th section of the Companies Act, in reference to which he seems to be of opinion that notice of the pledge to the company should not be deemed effectual for any purpose, and that the effect of the section is to exclude the application of *Hopkinson* v. *Rolt* (1). I cannot agree that the notice had no operation. It may not have affected the company with any trust in favour of the pledgees, but it was a valid and operative intimation to the company that the whole beneficial interest of the shareholder had been pledged to the bank.

Although my noble and learned friend has correctly quoted the opinion of Lord Selborne on the effect of sect. 30, yet it is observable that the other noble Lords who took part in the decision of the *Société Générale* v. *Walker* (2) expressly refrain from deciding the case on that ground, and I do not find that Lord Selborne expressed any opinion that the notice may not have been operative for other purposes.

Order appealed from reversed; order of Field J. restored; with costs in the Court of Appeal and in this House; cause remitted to the Chancery Division.

Lords' Journals 7th December 1886.

Solicitors for appellants; *Paterson, Snow, Bloxam & Kinder for Gardiner & Jeffery, Bradford.*

Solicitor for respondents: *R. Vincent for North & Sons, Leeds.*

(1) 9 H. L. C. 514.

(2) 11 App. Cas. 20.

[HOUSE OF LORDS.]

JANE WAKELIN (PAUPER) . . . . . APPELLANT;

AND

THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. . . . . } RESPONDENTS.

H. L. (E.) 1886 Dec. 10.

Negligence—Railway Company—Level Crossing—Contributory Negligence—Onus of Proof with regard to Contributory Negligence.

A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.

An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff:—

Held, affirming the decision of the Court of Appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident, that there was therefore no case to go to the jury and that the railway company were not liable.

Observations as to the onus of proof with regard to contributory negligence.

APPEAL from a decision of the Court of Appeal.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act, 9 & 10 Vict. c. 93.

The statement of claim alleged that the defendant's line between Chiswick Station and Chiswick Junction crossed a public footway, and that on the 1st of May 1882 the defendants so negligently and unskilfully drove a train on the line across the footpath and so neglected to take precautions in respect of the train and the crossing that the train struck and killed one Henry Wakelin the plaintiff's husband whilst lawfully on the footpath.

The statement of defence admitted that on that day the

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plaintiff's husband whilst on or near the footpath was struck by a train of the defendants, and so injured that he died, but denied the alleged negligence; did not admit that the deceased was lawfully crossing the line at the time in question; and alleged that his death was caused by his own negligence and that he might by the exercise of reasonable caution have seen the train approaching and avoided the accident.

At the trial before Manisty J. and a special jury in Middlesex in December 1883 the following evidence was given on behalf of the plaintiff. It appeared from the defendants' answers to interrogatories that the crossing was a level crossing open to all foot passengers: that the approaches to the crossing on each side of the line were guarded by hand gates: that there was a slight curve at the crossing: that assuming the deceased to have been crossing the line from the down side and standing inside the hand gates but not on the line he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre of the line he could have seen a train approaching on the down side at a distance of more than one mile: that the body of the deceased was found on the down side of the line and that he was run upon and killed by a down train: that the engine carried the usual and proper head lights which were visible at the distances above mentioned: that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing: that a watchman in the company's employ was on duty from 8 A.M. to 8 P.M. to take charge of the gates and crossing and amongst other duties to provide for the safety of foot passengers.

Oral evidence was given that from the cottage where the deceased lived it would take about ten minutes to walk to the crossing; that he left his cottage on the evening of the 1st of May after tea, and that he was never seen again till his body was found the same night on the down line near the crossing. There was no evidence as to the circumstances under which he got on to the line. Witnesses for the plaintiff gave evidence (not very intelligible) as to the limited number of yards at which an approaching train could be seen from the crossing, and as to obstructions to the view.

The defendants called no witnesses, and submitted that there was no case. Manisty J. left the case to the jury who returned a verdict for the plaintiff for £800. The Divisional Court (Grove J. Huddleston B. and Hawkins J.) set aside the verdict and entered judgment for the defendants. The Court of Appeal (Brett M.R. Bowen and Fry L.JJ.) on the 16th of May 1884 affirmed this decision. In the course of his judgment Brett M.R. said that in his opinion the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give primâ facie evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident she had failed in giving evidence of that necessary part of her primâ facie case.

From this decision the plaintiff appealed.

Nov. 26, 29. *Acland,* for the appellant, contended that there was evidence of negligence (viz. the dangerous nature of the crossing and approaches; the neglect to whistle or use any kind of warning except the use of head lights; the withdrawal of the gatekeeper after 8 P.M.) from which the jury might reasonably infer that the negligence caused the death: that the case was on all fours with *Williams* v. *Great Western Railway Company* (1) which governed the present case.

[LORD HALSBURY L.C.:—There the defendants neglected a statutory duty, thereby allowing the child to stray on to the line.]

Whether the duty is statutory or not can make no difference. He also contended that the onus was not on the plaintiff to shew that nothing else but the defendants' negligence contributed to the accident: per Lord Penzance in *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (2); that all dicta to the contrary effect by Lord Esher M.R. in the Court of Appeal in the present case and elsewhere were unsound and contrary to reason

(1) Law Rep. 9 Ex. 157. (2) 3 App. Cas. 1155, 1180.

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and authority; and commented upon *Davey* v. *London and South Western Railway Company* (1). He also distinguished *Hammack* v. *White* (2) and *Cotton* v. *Wood* (3).

Murphy Q.C. and *R. G. Arbuthnot* (*Arthur Charles* Q.C. with them) for the respondents contended that even assuming the circumstances alleged against the railway company to be evidence of negligence (which they denied), there was nothing whatever to connect the negligence with the accident: that unless the plaintiff shewed that the proved negligence caused or was connected with the accident there was nothing for the jury: that this point alone was enough for the decision of the present case; and referred to *Ellis* v. *Great Western Railway Company* (4); *Metropolitan Railway Company* v. *Jackson* (5); and *Chicago and North Western Railway Company* v. *Gertsen* (6) (a decision of the Appellate Court of Illinois), and pointed out that it was not necessary to discuss any question of contributory negligence or whether the onus of disproving contributory negligence lay on the plaintiff or not. They also contended that the defendants had performed their statutory duty in providing gates, and had neglected no statutory duties: that the neglect of self-imposed duties was not actionable negligence, and referred to *Skelton* v. *London and North Western Railway Company* (7).

Acland replied.

The House took time for consideration.

Dec. 10. LORD HALSBURY L.C.:—

My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this

(1) 12 Q. B. D. 70.
(2) 11 C. B. (N.S.) 588.
(3) 8 C. B. (N.S.) 568.
(4) Law Rep. 9 C. P. 551.
(5) 3 App. Cas. 193.
(6) 15 Bradwell, 614, 616.
(7) Law Rep. 2 C. P. 631.

case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "Ei qui affirmat non ei qui negat incumbit probatio." I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law.

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because "in pari delicto potior est conditio defendentis." It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained.

In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to shew that the train ran over the man rather than that the man ran against the train? I understand the admission in the answer to the sixth interrogatory to be simply an admission that the death of the plaintiff's husband was caused by contact

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with the train. If there are two moving bodies which come in contact, whether ships, or carriages, or even persons, it is not uncommon to hear the person complaining of the injury describe it as having been caused by his ship, or his carriage, or himself having been run into, or run down, or run upon; but if a man ran across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished.

Again, is there any legal presumption that people are careful and look before them on crossing a railway, or even when they do see the approach of a train that they never cross when the train is dangerously near? And yet if one of these hypotheses were established the plaintiff must fail, while on the other side it would be extremely difficult to lay down as a matter of law that precautions which the legislature has not enjoined should be observed by a railway company in the ordinary conduct of their traffic. Railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines. Rightly or wrongly the legislature have permitted the railways to cross roadways on a level, and it must be taken that the legislature, wherever they have given that authority, and without requiring special measures of precaution, have left to the railway company the discretion of using their lines in a reasonable and proper fashion. I can understand that circumstances might exist which might call upon the railway company to take unusual precautions, though not prescribed by statute, but the peculiarity about this case is that no one knows what the circumstances were. The body of the deceased man was found in the neighbourhood of the level crossing on the down line, but neither by direct evidence nor by reasonable inference can any conclusion be arrived at as to the circumstances causing his death.

It has been argued before your Lordships that we must take the facts as found by the jury. I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendants' negli-

gence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

Under these circumstances, I move that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON:—

My Lords, in the view which I take of the evidence adduced at the trial before Manisty J. it may not be absolutely necessary to say anything in regard to the onus which attaches to the plaintiff in this and similar cases. I shall nevertheless express my opinion upon the point, because it was discussed in the judgments delivered in the Court of Appeal, and has been fully and ably argued at your Lordships' bar.

It appears to me that in all such cases the liability of the defendant company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord Hatherley and Lord Penzance in the *Dublin, Wicklow, and Wex-*

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ford Railway Company v. *Slattery* (1). I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of "not guilty," or is made the subject of a counter issue, it is substantially a matter of defence, and I do not find that the other noble Lords, who took part in the decision of Slattery's Case, said anything to the contrary. In expressing my own opinion, I have added the words "in the first instance," because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favour to which they would not otherwise have been entitled.

The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient per se to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion. Of course a plaintiff who comes into Court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses; but that cannot affect the question upon whom the onus lies in the first instance. As Lord Hatherley said in *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (2): "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

(1) 3 App. Cas. 1169, 1180. (2) 3 App. Cas. 1169.

In the present case, I think the appellant must fail, because no attempt has been made to bring evidence in support of her allegations up to the point at which the question of contributory negligence becomes material. The evidence appears to me to shew that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned.

I am accordingly of opinion that the order appealed from must be affirmed.

LORD BLACKBURN :—

My Lords, I have had the advantage of perusing in print the opinion just delivered by my noble and learned friend. In it I perfectly agree.

LORD FITZGERALD :—

My Lords, the case of the plaintiff appellant whose husband was killed on the railway is thus put in the amended statement of claim :—" The defendants so negligently and unskilfully drove a train on the said line across the said public footpath, and so neglected to take such precautions in respect to the said train and the said public footpath as were necessary to prevent injury to the public with respect to the crossing of the said public footpath that the said train struck the said Henry Wakelin, the husband of the plaintiff, whilst lawfully on the said footpath, and so injured the said Henry Wakelin that he died therefrom."

The defendants deny the whole of these allegations save that Wakelin was killed by a train of the defendants on or near the footpath. No living person appears to have witnessed the occurrence and the evidence given at the trial does not shew under what circumstances or how or at what precise time the deceased met his death. We have only the admission on the pleadings

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"that on the 1st May 1882 Henry Wakelin, while on or near a certain public footpath across the defendants' railway, called Dean's Crossing, was struck by a train belonging to the defendant company, and so injured that he died on the said day." The unfortunate deceased was found dead on the railway and we know nothing more of the particulars attending his death save so far as the admission in the pleadings may be supplemented by any inference to be drawn from the defendants' answer to the 6th of the interrogatories, "that the body of plaintiff's husband was found on the down side of the line, and he was run upon and killed by a down train."

There was evidence also intended to establish negligence on the part of the defendants, in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin. It fell short of proving that the immediate and proximate cause of the calamity was the negligence of the defendants. We are left to mere conjecture as to whether it was the causa causans, and that we cannot resort to. The plaintiff undertook to establish negligence as a fact, and that such negligence was the cause of her husband's death. She failed to do so, and the proper course to have adopted at the close of the plaintiff's case was to have directed a verdict for the defendants.

Manisty J. sent two questions to the jury: "Was there negligence on the part of the company? 2. Was there negligence on the part of the deceased man? If you do come to the conclusion that the plaintiff is entitled to your verdict, that is to say, that it was entirely and wholly due to the negligence on the part of the company, what damages do you think the plaintiff is entitled to?" The jury found for the plaintiff, which was equivalent to a finding in the affirmative on the first question and in the negative on the second, but notwithstanding their finding the learned judge appears to have so seriously doubted that he sent the parties to move for judgment in the Divisional Court. The Divisional Court entered up judgment for the defendants, and in my opinion the decision was right, though I am not prepared to adopt entirely the reasons expressed by that tribunal for its decision.

It is not necessary for me to add another word, and I would refrain from doing so if there had not been some reasons given both in the Divisional Court and in the Court of Appeal which I am not prepared to assent to without further consideration. I understand the Master of the Rolls to have laid down that the plaintiff in such a case is bound to establish, first, negligence on the part of the defendants; second, that such negligence caused the injury of which the plaintiff complains; and further, if not involved in number two, that the plaintiff was bound on his case to give affirmative evidence of the negative proposition that he did not negligently contribute to the accident. The latter proposition was not very much pressed in argument before us. It is not necessary for your Lordships to come to any decision on it, but I desire to guard myself against being supposed now to assent to it.

Probably in most cases it will be found to be a contest of words only. Contributory negligence in such a case as the present seems to me to consist of the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which had it been exercised would have enabled him to avoid the injury of which he complains, or the doing of some act which he ought not to have done and but for which the calamity would not have occurred. I have used the words "ordinary care;" extraordinary caution is not required, but if by the use of ordinary caution he might have avoided the injury, and did not, he is not entitled to recover damages.

Before the passing of Lord Campbell's Act, 9 & 10 Vict. c. 93, in a common law action for an injury alleged to have been caused by the negligence of the defendant, and when that most convenient plea "not guilty" was permitted, I always understood that if the defendant relied as a defence on contributory negligence, though he was permitted to establish it under "not guilty," yet the issue lay on him, and I am not aware that any different rule has been established since the passing of that statute, or since the practice has been adopted of putting in special defences, whether the action was at Common Law for a personal injury or under the statute for a wrongful act causing the death. The plaintiff does not in the statement of claim

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allege in terms the absence of contributory negligence, and the defendant if he relies on it does so affirmatively by special defence, as in the case now before us. "The defendants further say that the death of the said Henry Wakelin was caused by his own negligence, and that he might and could by the exercise of reasonable care and caution have seen the train approaching and avoided the accident."

It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiffs' witnesses. In such a case, if there is no conflict on the facts in proof, the judge may withdraw the question from the jury and direct a verdict for the defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof, then it is for the jury to decide. But if the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence or from which it can be reasonably inferred—then the defendant is left to give such evidence as he can to sustain that issue.

It may be that the practice of the law has in this respect been altered, or ought to be established on the basis pointed out by the Master of the Rolls, but as yet that has not been shewn to our satisfaction.

There is another proposition in the judgment of the Master of the Rolls relating to the same subject-matter expressed thus:—"But although the plaintiff had given in the first instance primâ facie evidence of an absence of negligence on his part, if the defendant brought forward evidence which was contradictory of that, then you came again with the burden of proof upon the plaintiff, because, if upon the conflict of that evidence, part of which was given by the plaintiff and part by the defendant, the jury or the tribunal which had to try the fact is left in doubt whether the plaintiff was or was not negligent, contributing to the accident, the verdict and judgment must be for the defendant, because the burthen of proof lies wholly on the plaintiff." If the noble and learned Master of the Rolls means that if the evidence is such that the jury might reasonably come to a

conclusion in favour of the plaintiff or might reasonably draw a contrary inference the case is to be withdrawn from the decision of the jury and a verdict and judgment go for the defendant, I desire to say that I am not to be taken as acquiescing in that proposition.

I am of opinion that the order of the Court of Appeal should be affirmed.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 10th December 1886.

Solicitor for appellant: *E. A. Chandler.*
Solicitors for respondents: *Bircham & Co.*

[HOUSE OF LORDS.]

UNION BANK OF SCOTLAND . . . APPELLANTS;

AND

NATIONAL BANK OF SCOTLAND . . RESPONDENTS.

Right in Security—Disposition ex facie absolute—Security for past and future Advances—Notice of Assignation by Debtor of all Reversionary Interest—Further Advances after Notice.

A disponee who holds property on an ex facie absolute title of ownership, but in security only of advances made and to be made to the disponer, is not entitled to hold the property for repayment of advances made after he has received notice that the disponer has, for a valuable consideration, conveyed his reversionary right in the property to another:—

So *held*, reversing the decision of the Court of Session, following the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514).

APPEAL from the Court of Session, Scotland, on a special case in which the National Bank of Scotland, the respondents, were first parties, and the Union Bank of Scotland, the appellants, were second parties.

In 1879 Mrs. McArthur disponed to the National Bank and their assigns certain heritable subjects. The disposition was dated the 12th, and recorded the 15th of February, 1879. On

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the same date as this deed Mrs. McArthur wrote as follows to the National Bank:—

I, Mrs. Mary Anne Brown or McArthur, residing in Greenock, widow of the late William McArthur, merchant, Greenock, herewith deliver to you a disposition, of even date herewith, granted by me in your favour, of subjects on the, &c.; and I agree that you shall hold said disposition in security, and until full and final payment, of all sums of money now due, or which may hereafter become due, by the company firm of William McArthur & Co., and me, the said Mrs. Mary Anne Brown or McArthur, and William McArthur, the sole partners of the said firm, as such partners, to you: And as to the said heritages, I undertake to keep the same fully insured against fire, and to relieve you of all the liabilities and responsibilities attaching to the ownership thereof, while at the same time you shall have full power at pleasure to exercise the rights of ownership, by letting or selling the same, it being understood that any rents or prices you may receive shall be applied towards payment of whatever may be due by the foresaid firm of William McArthur & Co., and partners thereof, to you; and that on payment of all such sums, before sale of said heritages, you shall, at my expense, convey the said heritages to me, the said Mrs. Mary Anne Brown or McArthur.

The National Bank agreed by letter dated the 14th of February, 1879, to hold the above-mentioned disposition on the terms stated in Mrs. McArthur's letter.

On the 13th of August of the same year Mrs. McArthur executed an assignation in favour of the Union Bank, which was intimated to the National Bank, and a full copy of the deed delivered to them on the 18th of August.

The terms of the assignation were as follows:—

I, Mrs. Mary Anne Brown or McArthur, &c., for certain good and onerous causes and considerations, but without any price paid, do hereby alienate, assign, and dispone to and in favour of the Union Bank of Scotland, and to the assignees and disponees whomsoever of the said bank, all and whole my right, title, and interest, &c., of what kind or nature soever, which now belongs or which hereafter may belong to me, or my heirs, executors, and representatives whomsoever, and which now is or may hereafter be competent to me and my foresaids, in and to the lands and others hereinafter described, under and by virtue of the right of reversion or other right belonging to me arising out of (*first*) an absolute disposition dated the 12th, and recorded, &c., granted by me in favour of the National Bank of Scotland; and (*second*) relative back-letter granted by me to the said National Bank, dated the said 12th day of February, 1879, and a letter granted by the said bank to me, dated the 14th day of the said month of February, 1879: . . . And I grant warrandice; but excepting therefrom (*first*) a bond and disposition in security affecting said subjects for the sum of £2500, granted by me in favour of the trustees and executors of the deceased William Park, dated 9th September, and recorded in the division of

the General Register of Sasines for Renfrewshire, 3rd October, 1876; and (*second*) the said disposition in favour of the said National Bank of Scotland: And I have herewith delivered up to my said assignees my copy of the said letter granted by me to the said National Bank of Scotland, and their said letter to me surrogating and substituting the said Union Bank of Scotland, and their foresaids, in and to my full right and place in the premises, and I consent to the registration hereof for preservation, &c.

The Union Bank and Mrs. McArthur also entered into an agreement by which, inter alia, they agreed that "the said assignation and disposition granted by Mrs. McArthur, although ex facie absolute and irredeemable "are in reality granted and to be held by the Union Bank in security of the sum of £2400, being the balance due under two bills drawn," &c. The agreement also declared, "that the whole rights, obligations, and remedies of parties arising under these presents in any manner of way shall be mere personal questions between them, and shall in no way affect third parties; and it shall not be competent to record these presents, or any part thereof, for publication in the General Register of Sasines, or in any other register, whether public or private." The account current between William McArthur & Co. and the National Bank was opened on the 18th of February, 1879, with a credit of £800. At that date the amount of bills discounted and held by the National Bank, on which the firm were liable, was about £1684, the bills being due on the 21st of May, 1879. On the 18th of August, 1879, the current account was overdrawn to the amount of £604, and the amount of bills was, as before, due on the 24th of August, 1879. The National Bank continued to make further advances to the firm; and no notice of these advances was given to the Union Bank. On the 28th of March, 1882, the firm assigned their affairs to a trustee for behoof of creditors. At this date, the account current with the National Bank was overdrawn to the extent of £4183.

On the 18th of August, 1879, the date of the intimation to the National Bank, the firm were indebted to the Union Bank to the extent of £2400, and the subsequent operations on the account resulted in the firm being at the date of the trust deed (28th of March, 1882) indebted to the Union Bank in about £1009—since reduced to £727 by the realisation of a separate

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security. The value of the subjects was not sufficient to allow both the appellants and respondents being paid in full.

The Union Bank claimed to be entitled to the reversion of the property to the extent of their debt, after satisfaction of the sums due to the National Bank as at the date when the assignation was intimated to them.

The National Bank, on the other hand, maintained that they had a real security over the subjects for the whole amount of their advances. The following questions were put to the consulted judges of the Court of Session, Scotland :—

"(1.) Is the security of the first parties (the National Bank) over the said subjects preferable to the security of the second parties (the Union Bank) to the extent of the whole sum due to the first parties by the firm of McArthur & Co. at the date of the trust deed?

"(2.) Is the first parties' preference limited, in a question with the second parties, to the amount due by the said firm to the first parties on the 18th of August, 1879, the date of the intimation of the said assignation."

The First Division ordered printed minutes of debate to be lodged by the parties.

That for the National Bank was substantially as follows :—

By the infeftment of the National Bank, Mrs. McArthur was and remains divested of the subjects, and nothing remains in her, except a mere personal right to demand a reconveyance on payment of all debts due by her firm, or the partners thereof, to the National Bank at the date of the demand. After Mrs. McArthur had granted the absolute disposition she had no power remaining in her to burden the subjects; she could only burden her own personal right, which was not a right in the subjects at all: Bell's Comm. vol. ii. (5th Ed.) 293. Thus the Union Bank hold no security over the subjects, but only over Mrs. McArthur's personal right to demand a reconveyance, and no such conveyance has ever been demanded. Again, the Union Bank knew the terms of the back-letter, and they knew that the "reversionary right" into which they were assigned was, by the very terms of the back-letter, an unfixed and fluctuating one. It certainly was so in the

person of Mrs. McArthur, and she could do no more than substitute her assignees into her full right and place in the premises. The Union Bank contend the National Bank were not entitled after notice of the assignation to make further advances; because notice operated to fix and limit the National Bank's security to the amount of the indebtedness as it then stood. This contention is rested on a supposed analogy between this case and those cases in which a back-letter or back-bond has been recorded or has been founded on in judgment: see Bell's Comm. (7th Ed.), 729; *Chalmers* v. *Redcastle*, 1795 (1); *Place* v. *Trustees of McNab*, 1821 (2). But the analogy between the effect of intimation and the effect of recording a back-bond fails because the recording of a back-bond in these terms would not have the effect contended for. Even were it otherwise, the first parties dispute that private notice of an assignation of the reversion could be regarded as equivalent in its legal effect to the recording of a back-bond. The Union Bank rely on the English authority: *Hopkinson* v. *Rolt*, 1861 (3), followed in *London and County Bank* v. *Ratcliffe*, 1881 (4). But the theory and practice of English law regarding mortgages and securities over real estate is very different from that of Scotland. It is quite consistent with the English theory that the undivested owner should be able to create new charges over the estate. According to Scotch law, on the other hand, the original owner was in the present case divested of the property. What the disponee gets is not a charge over it, but a property in it; and there remains nothing which the original owner has the power of burdening, except the personal obligation in which he is creditor.

The minute of debate for the Union Bank was, inter alia, as follows:—

The Union Bank admit the preferable right of the National Bank for the amount due to them at the date of the intimation; but they submit that their right to the debt of £727 due to them is preferable to the right of the National Bank for advances made after the date of the intimation. The National Bank rely solely on the form in which the security to them was taken. And that

(1) 3 Pat. App. 417.
(2) Hume, Dec. 544.
(3) 9 H. L. C. 514.
(4) 6 App. Cas. 722.

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by virtue of the ex-facie absolute disposition, they are entitled to hold the property as against all debts due to them, whenever constituted; that the sole right left in Mrs. McArthur after the date of the disposition, was a right to call upon the National Bank to denude upon payment of all debts due by the firm at the time; and that the Union Bank have no higher or other right than Mrs. McArthur. The Union Bank do not dispute the general rules of law in regard to a security constituted by an absolute disposition with back-bond, but they are inapplicable here.

The right of the disponee under such a security is truly a right of retention,—a right to hold the property until all sums due by the disponer are paid. But the disponer can at any time demand, as matter of right, to be reinvested in the property, upon making payment of the sums then due. The disponer has thus a reversionary interest in the property, which can at any time be made available. And it is not contended that this reversionary interest cannot be assigned. The National Bank do not suggest that Mrs. McArthur had not the power and the right to assign her reversionary interest in the property. They only say that the assignees can have no higher right than the assignor. This is admitted; but the National Bank would put the assignees in a worse position than the assignor. What was assigned (stating the case in the most favourable way for the first party) was Mrs. McArthur's right to demand re-investment in the property, upon payment of the sums due by her firm to the first party at the date of the assignation. But the contention of the National Bank amounts to this, that what Mrs. McArthur assigned, and what the Union Bank actually accepted as a security, was not the right which Mrs. McArthur then had, or the reversion of the property which she could then make available, but the right and reversion, as they might happen to be at some future and indefinite time, and after further debts of unlimited amount had been incurred.

But the limit of the National Bank's right was to hold the property against the whole debt due to them at the date of the intimation. And it was a totally different thing to say that after they had received formal intimation that Mrs. McArthur had

assigned her whole reversionary interest, they were still entitled to make advances to her upon security of that very interest which she had parted with for onerous causes. In order to maintain this argument, the National Bank are forced to rely entirely on the absolute disposition, leaving the back-letter, and the fact that the disposition was merely in security, out of view. But it is settled by a series of decisions that when a disposition, although ex-facie absolute, is really in security only, the rights of parties interested must be dealt with upon the footing that it is merely a security. *Liquidators of City of Glasgow Bank* v. *Nicolson* (1); *Stewart* v. *Brown* (2); see also *Keith* v. *Maxwell*, 8th July, 1795 (3); *Gardyne* v. *Royal Bank of Scotland* (4): and as to restriction of the security if recorded or produced judicially, Bell's Comm., vol. i. (7th ed.) 725. Then if the rights of parties are to be dealt with on the footing that the right of the National Bank was merely a security, Mrs. McArthur was entitled to grant a security to the Union Bank over the property in so far as it was not required to meet the debt then due to the National Bank. And the Union Bank are entitled to the full benefit of the balance of the property.

In England it is settled that where a person mortgages his property for advances made and to be made, and thereafter grants another mortgage over the property of which the first mortgagee gets notice, the first mortgagee is postponed as regards advances made after the date of the notice: *Hopkinson* v. *Rolt* (5). That decision was given effect to in the recent case of *London and County Banking Company* v. *Ratcliffe* (6); see also the *Bradford Banking Company* v. *Briggs & Co.* (7). If the National Bank's right is to be considered as a security only, there is no such difference between the jurisprudence of the two countries as to justify rules established in England as to the rights of successive security holders being disregarded in the consideration of similar questions in Scotland. Again, Mrs. McArthur after she had granted the assignation to the Union Bank, was not entitled to

(1) 9 Court Sess. Cas. 4th Series, 689.
(2) 10 Ibid. 192.
(3) 2 Ross, L. C. 723.
(4) 13 Court Sess. Cas. 2nd Series, at p. 929.
(5) 9 H. L. C. 514.
(6) 6 App. Cas. 722.
(7) 29 Ch. D. 149; 31 Ch. D. 19; ante, p. 29.

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defeat that assignation by borrowing money upon the interest she had assigned. And the National Bank knew that she had assigned her interest, and that she had no right to ask for further advances; they must therefore bear the loss.

On the 18th of December, 1885, the following interlocutor was pronounced: "The Lords having heard counsel on the special case, and considered the minutes of debate thereupon, together with the opinions of the whole consulted judges, find and declare, in conformity with the opinions of the majority of the judges of the whole Court, (first) that the security of the first parties over the said subjects is preferable to the security of the second parties to the extent of the whole sum due to the first parties by the firm of William McArthur & Co. at the date of the said trust deed; and (second) that the first parties' preference is not limited in a question with the second parties to the amount due by the said firm to the first parties on the 18th of August, 1879, the date of intimation of the said assignation (1)."

The following eight judges were in favour of the National Bank:—The Lord President (Inglis), The Lord Justice-Clerk (Moncreiff) and Lords Mure, Craighill, Lee, Fraser, McLaren, and Trayner.

The judges in favour of the Union Bank were Lords Shand, Adam, Young, Rutherfurd Clark, and Kinnear (2).

(1) 13 Court Sess. Cas. 4th Series, 380.

(2) The opinions of the judges of the First Division in favour of the National Bank, were substantially as follows:—

LORD PRESIDENT (INGLIS):—By the common law no effectual security can be constituted over lands or other heritable subjects for debts or burdens of indefinite amount. By Statute 1696, c. 5, lands and other heritable subjects cannot be effectually burdened by debts, even of fixed amount, if they have not been contracted at or prior to the date of the infeftment of the creditor. This rule, however, is so far relaxed by the Bankrupt Acts of 1793 and 1814, that securities may be constituted in favour of bankers and other persons making advances to their debtor subsequent to the date of the infeftment, under the express condition that the amount of the contemplated future advances shall be limited to a certain definite sum to be specified in the security.

These rules have regard only to deeds which are securities in form as well as in reality, in which the lands or other subjects are conveyed "redeemably," and on the face of the writ expressly in security for repayment of debt. In all such cases the property remains with the debtor, and the creditor is a mere incumbrancer whose right is extinguished by a discharge. But the exigencies of commerce, and especially the dealings of bankers with their

mercantile customers, make it necessary, or at least very desirable, to have a more elastic security than any of the ordinary security writs afford, which shall enable a banker with safety to make advances which may exceed the sum originally required by their customer, and intended to be advanced by the bank, leaving a safe margin of value for the bank's reimbursement.

The form which has been adopted to attain this end is by means of the debtor granting to the creditor a conveyance of his property in absolute terms, "heritably and irredeemably," and taking in return a back-bond or back-letter stating the conditions on which the debtor is to be entitled to a reconveyance of his property. In this case the creditor acquires a right of property which cannot be extinguished by discharge, but only by reconveyance. If the back-bond or back-letter provides that the debtor is to be entitled to demand such reconveyance only on condition of his paying everything he owes the creditor at the date of the demand, it is not contended that this is an unlawful or ineffectual condition; and such contention, if it were attempted, must necessarily fail, because it would be in direct opposition to a recognised principle of the common law of Scotland.

This is the doctrine of retention, which was derived from the Roman law, was introduced into our jurisprudence at an early period, and has been applied by judgments of the Court to a great variety of cases. The late Professor More, in a scientific and justly-admired dissertation on the subject, has shewn that this principle is essentially necessary to the consistency and completeness of our law of obligations, and is in no case more clearly applicable than when the party pleading it holds an absolute title of property to the subjects retained, whether heritable or moveable.

The late Lord Moncreiff very clearly described this right in a case of retention of moveable property, *Melrose* v. *Hastie* (13 Court Sess. Cas., 2nd Series, 900).

In a later case, which raised an important question how far the Mercantile Law Amendment Act interfered with the right of the seller of undelivered goods to retain not only for the price, but also for a general balance due by the seller, the consulted judges, expressing the opinion of a large majority of the Court, thus stated the common law rule, that the sellers were, "notwithstanding the payment to them of the price of the goods, entitled to retain them against all the world in security of the balance due to them by the buyer on general account. This is not lien, as it is sometimes very inaccurately called, for no one can have a lien over his own property. It is the right of retention, the extent and effect of which are measured by the title of possession, and are greatest in cases like the present, where the title of possession is nothing short of undivested ownership:" *Wyper* v. *Harveys* (23 Court Sess. Cas., 2nd Series, 611).

In its application to such a case as the present, where heritable property is the subject of retention, the rule is very clearly stated by Professor Bell (1 Bell's Com. 724), and his statement of the law is amply supported by the series of decisions cited by the learned author, and by others of recent date to which it would be a waste of time more particularly to refer.

There is, however, among those cited by the parties, one case on which, for the purpose of avoiding misconception, I think it right to offer a few words of explanation—the case of *Keith* v. *Maxwell* (2 R. L. C. 723).

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But to appreciate rightly the ground of judgment, the former case of *Riddel* v. *Niblie's Creditors* (M. 1154), and the emphatic terms of the judgment in that case, must be borne in mind; because the eminent judges who decided *Keith* v. *Maxwell* are careful to save the authority of the case of *Riddel*. The lands in *Riddel* v. *Niblie's Creditors* were disponed absolutely and irredeemably, and the back-bond bore that the disposition was made to secure not only debts already contracted, but also debts to be contracted by the disponer to the disponee; and the judgment is recorded in these terms:—"The Lords, in respect this was not an infeftment in relief or security, but an absolute disposition to the property, sustained the same to the extent of the debts due by Jamieson to Niblie, at whatever time contracted."

The case of *Keith* v. *Maxwell*, I think, has been misunderstood, partly from the circumstances being at first sight rather complicated, and also partly from the way in which it is reported by the Faculty Collectors of the period, whose report is repeated in Morrison's Dictionary. The separate report of Mr. Robert Bell gives the opinions of the judges in detail, and corrects erroneous inferences drawn from the other report. See Bell's Folio Cases, p. 234. [His Lordship gives the facts.]

The distinguishing peculiarity of this case is, that the disponee infeft absolutely did not hold the property for his own interest, but only as trustee for a third party, a creditor of the disponer. To attempt to engraft on this strictly fiduciary title of the disponee a security for a personal claim of the disponee himself, was manifestly an abuse, and a dangerous abuse, of the rule of *Riddel* v. *Niblie*. At the ultimate advising of the case, Lord Braxfield (J. C.), with the concurrence of the Lord President Campbell, said, "What I go upon is this, that a reduction was brought of the security for the £6000 bond, and in that action it was established that the nominal disponee had not a right of property in him, and that he was only infeft as trustee for Mr. Constable, to the extent of securing the debt of £6000."

For these reasons I am not prepared to hold with Professor Bell and other writers who have followed him, that *Keith* v. *Maxwell* is an authority for the general proposition, that after the back-bond is recorded or produced in judgment, "the security is held to lose all power of farther extension, and to remain stationary as at that moment."—1 Bell's Com. 7th ed. p. 725.

But even assuming that Professor Bell's construction of that judgment is sound, it affords no countenance to the notion that anything short of recording the back-bond or producing it in judgment will have the same effect; still less can that judgment give any pretext for maintaining, when the whole transaction is disclosed by recording or otherwise publishing the back-bond, that the true contract between the parties so disclosed shall not receive full effect, or that a back-bond recorded which declares that the lands are held for security of all debts, past and future, or in other words, that the disponee's right shall be the ordinary common-law right of retention, shall not secure that right to the disponee.

I cannot assent to the proposition enunciated by some of the consulted judges, that there is no question of feudal law raised in this case, if by that is meant the law of real property, for it becomes necessary to examine the title of the National Bank in order

to ascertain what are precisely the character and rights which that bank thereby acquired.

There is no doubt that when the disposition to the National Bank was, on the 15th of February, 1879, recorded in the register of sasines, the bank were not only feudally invested in the subjects conveyed, but became, by the operation of the Conveyancing Act of 1874, the entered vassals of the superior. They were thus proprietors of the subjects conveyed in no qualified or secondary sense, but had, while the title remained unchanged, all the rights and were subject in questions with third parties to the obligations of the true owner. They became the only proper debtors in all the prestations due to the superior, such as payment of feu-duty (See *City of Glasgow Bank* v. *Nicolson* (9 Court Sess. Cas. 4th Series, 689). They could not use the diligence of poinding the ground for payment of the interest of their debt, because they were not creditors of the ground, but its owners, and proprietors cannot poind their own ground: *Scottish Heritable Security Company* v. *Allan Campbell & Co.* (3 Court Sess. Cas. 4th Series, 333.) They were entitled to sell the subjects, to collect the rents, to grant leases, to remove tenants, and to remove the debtor himself from possession, although admitting at the same time that their *ex facie* absolute disposition is in truth intended only as a security for debt: *Russell* v. *Rankin* (7 Court Sess. Cas. 3rd Series, 126).

The importance of using precise language in dealing with such a question as is now before us can scarcely be over-estimated, and I therefore regret that one of my brethren, whose felicity of expression in the exposition of legal principle I am accustomed to admire, should have adopted and repeated the language of Lord Fullerton, in *Robertson* v. *Duff* (2 Court Sess. Cas. 2nd Series, 279), describing an absolute disposition, with back-bond, as a "trust or security." That it is in effect a security no one can doubt. But to ascribe an absolute disposition, with back-bond, to the category of conveyances in trust, appears to me to be scientifically inaccurate. The operation and effects of trust conveyances are as various as the uses and purposes for which they are granted. Many of them are made for the purpose of giving effect to family settlements, to provide for the descent of estates which are the subject of obligations undertaken in a marriage-contract. Such conveyances, in the ordinary case, do not divest the grantor of his radical right to the estate, or distinguish his infeftment, although the trust conveyance may be onerous and irrevocable. Other trust conveyances are for the purposes of convenient administration merely, and may be recalled at any time. But a conveyance in trust for behoof of the creditors of an insolvent proprietor, by which the trustee is directed to sell the estate conveyed, and divide the price among the creditors, divests the grantor absolutely and extinguishes his infeftment in the land; and when acceded to by the creditors, becomes an irrevocable contract. In all such cases, the effect of the trustee's infeftment depends entirely on the powers expressly given to him in the conveyance or relative declaration of trust. But the disponee, in a case like the present, requires no express powers, because he is full proprietor: there is no beneficiary under the conveyance but the disponer himself. The character of a beneficiary holding a *jus crediti* under a trust-deed cannot attach to the divested disponer; for his sole

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right belongs to a different category altogether, as I shall immediately explain. In making these observations, I am not taking into account the numerous trusts of varying character created by statute, or of resulting trusts with incidental and indirect beneficial interests. My purpose is merely to express my objection to the use of the term "trust," in its ordinary sense of a deed granted for the purpose of creating temporary interests in third parties, as being in any way applicable to a disposition absolute with back-bond.

It follows from the nature of the right vested in the National Bank by the recorded conveyance of the property, that what is left in the debtor is not a real right of any kind, is not a right of property of any kind, not even a right of redemption or reversion in any proper sense, but a mere personal right to enforce a pactum de retrovendendo, or, in other words, to demand a reconveyance of the estate upon tendering to the infeft proprietor payment of everything that is due to him at the date of the demand.

That this is the true nature of the contract would be clearly established by the recorded deed of conveyance and the mere admission of the disponee that it was intended as a security for debt. But in the present case it is made still more clear by the terms of the letters of agreement which passed between the parties at the time.

When the grantor of the disposition to the National Bank proceeded on the 13th of August, 1879, to assign to the Union Bank all that was left in her person, the latter bank was made fully aware of the nature of the right vested in the National Bank. The terms of the assignation, therefore, appear to me of no consequence, for Mrs. McArthur could not give thereby a greater right than she herself possessed. But in truth she made no attempt to do so, for she limits her assignation expressly to the right which remained in her after giving full effect to the absolute disposition and unrecorded back-letter; and, if she had professed to do more, the intimation to the National Bank would have been simply a notice that she and her assignee had some intention in the future to commit a breach of contract, a notice which the National Bank would have been well entitled to disregard. The right which Mrs. McArthur really had, and which she conveyed to the Union Bank, was to demand a reconveyance from the National Bank upon payment of everything due to the said bank at the date of the demand. The Union Bank might, as assignees, have exercised the right so conveyed either immediately on acquiring the right or at any other time more convenient to them. This they have never done. But, now when the McArthurs have become insolvent, they insist that after their assignation was intimated to the National Bank, that bank was no longer entitled to make further advances to Mrs. McArthur, because, as they contend, the absolute disposition being merely a security, "it was within the power of the said Mrs. Mary McArthur to limit or restrict it to the amount due at a certain date, and that the intimation to the first parties of her assignation to the second parties operated as a restriction of the security to the amount of the advances made up to that date."

I confess I am quite unable to understand how the debtor under such a contract has the power to limit or restrict the security to an amount due at a certain date, except by refraining from incurring any more debt to the secured creditor; for if the debtor takes further advances, these come

within the very words of the back-letter. Neither do I see how she could pass to her assignee such a right as she did not possess herself. If the consent of the National Bank had been obtained to an arrangement by which the debtor was to deal with the Union Bank only for the future, and no more advances were to be made by the National Bank, that would have been intelligible, though I doubt whether the National Bank would have assented to such an arrangement, or to any new arrangement, except one which insured payment to them of all that would be due when a reconveyance came to be demanded.

Mala fides and fraud have been imputed to the National Bank in continuing to make advances to the McArthurs after the assignation to the Union Bank was intimated. But if there be any fraud in the case, it must consist, not in making these advances but in contending that they have a preferable security for their repayment. In other words, their fraud consists in making their present claim. But as that claim recommends itself to a majority of the Court, as well founded both in legal right and in equity, the charge of fraud does not assume a serious aspect.

It seems to me that the two banks are really standing on what they believe to be their legal rights respectively.

The one acted on the belief that the intimated assignation did not affect their security at all, and the other that it did to a certain extent. We are now to determine which of them is right in point of law. I am of opinion that the National Bank in what they did were merely carrying on their business as bankers in a perfectly legitimate way. Bankers do not enter into such transactions merely to oblige their customers, but also to make profit in the exercise of their calling. A transaction of this kind is a favourite of bankers—and most naturally, because they can judge from time to time how much it is safe to advance on the security of the property to which they have an absolute title. The more they can safely advance, the larger the profit they will make; and therefore to ask a bank to give up such a security, or the prospective value of it, before that value has been exhausted by advances, is simply to ask them to give up a valuable customer for no consideration. There is one very simple way of effecting this object, if the debtor and another banker desire and agree that the debtor's business shall be transferred to them, and that is by the debtor's new banker paying up the balance due to the old banker and taking a conveyance of the property to themselves, with the consent of the debtor. Why that course was not adopted in the present case has not been explained; and it is strange that no such explanation has been offered, for the course indicated would have accomplished every legitimate object which the debtors and the Union Bank could set before them.

I observe that none of the consulted judges has given any weight to the argument maintained by the Union Bank founded on the practice of English conveyancers, recognised by the English Courts. I am not surprised that this should be so. In the English system of jurisprudence there are no public records of land rights to regulate the claims and preferences of proprietors and creditors: there is no law to restrain the granting of redeemable securities for future debts: there is nothing corresponding to the rights and relations created by absolute disposition and back-bond: and the right of retention is altogether unknown,

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because it would be inconsistent with other rules of the common law of that country. It would surely be most unsafe in a case like this to seek for analogies in such a system.

If the judgment in this case had been in favour of the Union Bank, I should have thought it a calamity, for it would have disturbed settled principles of our law, on which the trading community have relied for generations, and would have introduced in their place an entirely new rule based on a supposed equity which has not been subjected to the test of experience, and which, after all the discussion which this case has undergone, has not either in argument or in the opinions of the minority of the consulted judges been in any way clearly defined or formulated.

LORD MURE:—I agree with the opinion of the majority of the consulted judges, and that substantially upon the same grounds as those on which their opinions are rested; and I also concur in the very clear and distinct exposition which your Lordship has now given of the law applicable to this important question.

As regards the main question, it has, I think, for long been quite settled in the law of Scotland, that when a bank agrees to make advances to a customer on receiving an absolute disposition to a property belonging to that customer of value sufficient to cover those advances, the bank acquires, ex facie of the titles and of the record, an absolute and exclusive right to the property, of which the disponer is thereby divested. Now that was the case here. By the disposition executed by Mrs. McArthur in February, 1879, she divested herself of all right of property in the subjects in question, and by the recording of that disposition the National Bank became the sole and absolute proprietor, duly entered with the superior, and they alone were in law entitled to sell and dispose of the property, and to exercise the rights of proprietor. Mrs. McArthur could not herself exercise any of those rights except under some arrangement with the bank; and she could not sell the property, or any part of it, for the best of all reasons, because she could not give a title to a purchaser. By her own act she had entirely divested herself of all right and title to the property, and the bank stood vested in it absolutely; and it was through the bank alone that Mrs. McArthur, or any other party, could obtain a title to it.

Having thus become absolute proprietors of the property, the bank were in law entitled to retain it as long as they continued to be creditors of Mrs. McArthur; and they could not be required to reconvey the property to her, or to any one else, except upon payment of all advances that had been made to Mrs. McArthur up to the date when a reconveyance was demanded.

All this is very clear from the various authorities which have been referred to by your Lordship, and by Lord Fraser (see post, pp. 71 et seq.) in his opinion; and it is perhaps as distinctly explained as anywhere else, by Mr. Bell in the passage in his Commentaries to which reference has been made (Bell Comm. (7th ed.), vol. i., p. 724), where it is shewn that in such a case the position of the borrower is no longer that of a proprietor, but that of a mere creditor in a personal obligation to demand a reconveyance of the property on payment of the whole advances made by the bank.

It was stated in argument, and the view seems to be adopted in some of the opinions, that Mrs. McArthur had

here retained some right in the property as the original proprietor, the radical right as it is sometimes called, and that she could dispose of this to any one she chose; and it is contended that she did in fact here dispose of it, by her assignation, to the Union Bank. That, however, is in my opinion an entire misapprehension, and must have proceeded from confounding the position of a proprietor, who is the grantor of an absolute disposition and back-letter, with that of a proprietor who grants an ordinary heritable security, or an ordinary trust deed in favour of his creditors. In the two latter cases the proprietor retains the radical right to the estate. Because his title and infeftment as proprietor stand good. In neither case has he conveyed away his right of property absolutely. In the one it is ex facie conveyed only in security of the debt; and in the other it is conveyed to trustees for payment of debt. But in both, the conveyance is a mere burden on the right; and upon the heritable bond being discharged, or the trust brought to an end, the original title as proprietor was available in the person of the grantor of the heritable bond in the one case, and of the trust-deed in the other, and no reconveyance was required to reinvest him in his property, because he had never been absolutely divested.

In the present case, on the other hand, Mrs. McArthur, the original proprietor, had been absolutely divested of the property, and the National Bank vested in it in her stead; so that, as already explained, she could not sell it, or grant a title to it, as she had no longer any right or title to it, and was merely a creditor in the personal obligation of the bank, to grant her a reconveyance when demanded, upon payment of the full sum which had been advanced up to the date of the demand. Here no such demand for a reconveyance has ever been made; so that, according to the rule of law which has been in operation ever since the decision in the case of *Niblie's Creditors* in 1782, the bank is here entitled to retain the property till the sums due by Mrs. McArthur have been paid.

For the reasons given by your Lordship and the majority of the consulted judges, I am quite unable to adopt the view that the intimation of the assignation had the effect of restricting the right of the National Bank to retain, except for advances made previous to the date of the intimation. The intimation of the assignation did not convey to the National Bank any information which would necessarily lead them to suppose that they were expected to make no further advances to Mrs. McArthur. If that was intended by the Union Bank, I cannot help thinking, having regard to the whole circumstances of the case, and the relative position of two such institutions, that it was the duty of that bank to have informed the National Bank of this intention. But, as they did not do this, and made no demand for a reconveyance of the property, on payment of the sum due at that date, while Mrs. McArthur, whose honesty in the matter I see no reason to doubt, continued to draw from time to time as before, it appears to me that the National Bank were quite justified in continuing to make those advances, and that they are now entitled to retain their hold of the property till those advances are paid.

Opinions of the consulted judges in favour of the National Bank:—

LORD JUSTICE-CLERK (Moncreiff):—I am of opinion that the questions must be determined by the terms of

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the contract between the National Bank and the debtor; that these are perfectly explicit, and that no reason has been stated why they should not be carried out.

I do not think the question in hand depends in any degree on the more general topics discussed in these able minutes of debate. It has been long settled that an absolute disposition to land, but accompanied by a personal bond or back-letter, expressive of the true contract of parties, will receive effect as only security if the parties have so contracted. It seems also to be clear that a right so constituted, although the disponee is not an absolute proprietor to many collateral effects, will yet in its incidents, operation, and enforcement confer a higher right than an ordinary bond and disposition in security. Such a right entitles the disponee to retain possession until all obligations due to him by the disponer have been satisfied, notwithstanding the provisions of the Act 1696, c. 5.

Most of the cases referred to in the written argument have but little bearing on the question in hand. It is true, although immaterial to the present issue, that when it appears that the absolute form has been adopted solely for the purpose of constituting a security, the radical real interest in the lands will be held to remain with the disponer; so that many collateral incidents of ownership, not essential to the security, may not be transferred to or against the disponee. Such were the cases of *Buchanan*, 1811 (16 F. C. 200), relative to a wife's terce; that of *Stewart* v. *Brown* (10 Court Sess. Cas. 4th Series, 192), relative to the Heritable Securities Act of 1847; and that of the *City of Glasgow Bank* v. *Nicolson* (9 Court Sess. Cas. 4th Series, 689), in regard to the liability of such a disponee for feu-duty. These cases, which are cited in the proceedings, have no application here. The right of an absolute disponee, although only a security creditor, to hold the subject of the disposition until relieved of all obligations, is truly of the nature of a right of retention, as was found in the leading case of *Niblie's Creditors* in 1782, a decision which has been followed ever since. In the case of *Robertson* v. *Duff* (2 Ross, Leading Cases, 736), which was a case regarding a trust deed granted in security but absolute in form, Lord Fullerton thus describes the difference between an absolute disposition and an ordinary security. He says: "The last does not divest the owner, but only burdens his right. The former does divest him, leaving him merely the creditor on the trustee's obligation to reconvey. Second, it is found that in the latter case the disponee, who possesses under a title ex facie absolute, may, when required to implement his obligation to denude, retain the subject until the obligations incumbent on the proprietor towards him shall be fulfilled." This principle has been applied in many cases, and is in no degree affected by the provisions of the Act 1696, as to future debts.

I only refer to these topics to put them aside. They are well settled; and I therefore assume that the original contract between the National Bank and their debtor was not only clear in its terms, but perfectly legal in itself, and that accordingly it was not in the power of the debtor to alter or affect its operation by herself, or anyone in her right, without the consent of the other party to the contract.

All the subtle questions which have arisen on this head in our law turned on one pivot,—the effect of our system of registration of land rights, and the

security thereby afforded to creditors. They would otherwise have been idle and unintelligible. But the present case stands entirely clear of them; and I proceed to consider the grounds on which the contention of the Union Bank is rested.

The main foundation of their argument, as far as I have been able to gather it, rests on two propositions: first, that the intimation made to the National Bank of the assignation in favour of the Union Bank was equivalent to recording the original contract between the first party and their debtor in the register of sasines; and, secondly, that such registration would in law prevent any further operations under the absolute disposition.

I think both propositions are untenable. I am of opinion that the intimation in question was not equivalent to the registration of the right assigned in any sense, or to any effect whatever; and I am also of opinion, that if the original back-letter, which constituted the contract, had been recorded, no such effect would have followed.

As to the first, the plea seems to confound matters which are essentially distinct. The original back-letter has never been recorded—in other words, it has never been published—for recording means publication. To intimate to the National Bank the contract they themselves had made would have been an idle proceeding; what was required was to inform them that the right of reversion constituted by the back-letter had been transferred to the Union Bank, and that, therefore, in the matter of reconveyance, the absolute disponee must deal with the assignee. This was the necessary and proper form of completing the assignee's title to the real right which was transferred by the assignation. But it is too clear for argument that the intimation did not give public notice of the right assigned. In other words, it was not equivalent to recording it, and as little was it producing it in judgment, seeing that no court of law had any concern with it. The effect of such intimation is too familiar for me to dwell on it farther.

I need not, however, illustrate this simple matter at length, because the argument of the Union Bank really turns on what I think a misconception of the law delivered in the case of *Keith* v. *Maxwell*, and Mr. Bell's remarks on that case (1 Com. (7th ed.) 725). It was not laid down in that case, as the Union Bank seems to think, that when a security for present and future debts is constituted by absolute conveyance and back-bond, the security ceases to be operative if the back-letter is recorded. The law there announced, whether rightly or not, was that, where a security for a specific sum is granted in this manner, and the disponee is bound to reconvey on payment of the specific sum, the infeftment under the absolute conveyance will not be available to secure a larger sum, if the true contract on which it proceeded has been previously made public by recording, or producing it in a litigated cause. The ratio of the judgment, as stated by Lord President Campbell, was that the public were entitled thereafter to rely on such being the limit of the burden. In that case the conveyance had been the subject of an action of reduction under the Act 1696, in the course of which it appeared, by production of a back-bond, that the security had been granted for a specific sum of £6000, on payment of which sum the disponee bound himself to reconvey the lands. Thereafter the grantor of the security endeavoured,

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by a written acknowledgment, to add £500 to the redemption money. The Court held that, as the production of this written obligation to reconvey the lands on payment of £6000, in this litigated case, had published the limit of the security to the public, it could not thereafter be extended. But it seems very clear that the grounds of this judgment would have led to an exactly opposite result in the present instance; for if the back-letter in this case had been recorded — which it never was — the public would only have learned the real contract of parties, and would have known that no reconveyance could be demanded until all debts due by the grantor to the disponee were paid. The remark of Mr. Bell, or his editor, that after recording the back-letter, such a security admits of no farther extension, refers to extension beyond the limits of the original contract, and could have no application to operations on the faith of a current security.

All these authorities proceed on our system of records, which is the foundation of our law as to the priority of real securities on land. We can, in such a question, derive no light from analogies in the law of England, which are founded on a system in which the publication of such burdens is not provided for, but rather repudiated and discountenanced. I am not competent to say whether the law of England is correctly represented in these minutes of debate; but if two securities were granted over land in Scotland in similar terms to the English mortgages referred to, they would both be null under the Act 1696; or if that statute were out of the way, would be preferable, according to their dates on the register. Alternating priorities of real rights is a term unknown to the law of Scotland.

It only remains to say a sentence or two on a kind of equitable view invoked by the Union Bank in aid of their contention. It is pleaded that by the assignation the Union Bank acquired the right of reversion, as it stood at that date, in the person of the cedent; and that to permit farther operations on the accounts, so as to increase the balance against the debtor, was a fraud both on the part of the cedent and on that of the disponee. But I can give no weight to this contention. It is true that the Union Bank came by this assignation into the place of the cedent, Mrs. McArthur, as far as related to the right to the reversion and the right to demand a reconveyance. But the right of the cedent rested entirely on the terms of the back-letter; and by those terms no reconveyance could be demanded, unless on payment of the balance remaining due at the date of the demand. But the Union Bank have not paid or tendered any balance, due at any date. As far as I see, they never demanded, or meant to demand, a reconveyance, for that would have implied a large advance in addition to the existing debt due to them. If they desired to stop operations against the security, they had it in their power to accomplish this at any time by paying up the balance; which, however, they have not done. On no other footing, in my opinion, could they interfere with or complain of the ordinary transactions of the National Bank with any of their customers.

The charge of fraud against the National Bank and Mrs. McArthur rests on no substantial grounds. We have no statement in the special case on this matter; but I should come, on the materials before the Court, to a very different conclusion. Seeing that the Union Bank for three years refrained

from putting their assignation in force and taking the reconveyance, and seeing also that, in point of fact, during this period, more than half the balance due to the Union Bank was repaid substantially out of sums drawn from the National Bank, I assume that there was no agreement or understanding that operations on the account were to cease. It is not said in the case that there was any such agreement. One can easily see that, with this assignation in their hand, the Union Bank might think it more for their interest, as long as their own debt was in course of reduction, to leave the security undisturbed, than to take steps which might have forced a sale, or involved a large advance. I am confirmed in this impression by the fact that the agreement between the Union Bank and Mrs. McArthur, which was not communicated to the National Bank, contains a clause to the effect that "The whole rights, obligations, and remedies of parties, arising in any manner of way, shall be mere personal questions between them, and shall in no way affect third parties." This hardly looks as if the debtor was expected to forego her means of credit, or the bank to relinquish any rights they had under their subsisting contract.

LORDS CRAIGHILL, LEE, and MACLAREN concurred in this opinion.

LORD FRASER, after stating the facts:—

There was here a contract whereby the National Bank, being money-lenders, had obtained a customer to whom they could make advances upon sufficient security. They had, no doubt, estimated the value of the property conveyed to them, and it must have operated upon their minds, in allowing the continuance of the existing debt, that they had before them the prospect of a safe investment for their future advances. They were not bound certainly to advance moneys to Mrs. McArthur, and might stop doing so at any time they thought proper—which of course would be when they considered that their advances came up to the margin of the security that they had obtained. Still it was part of this business transaction, that they might make these profitable future advances; and upon this footing they did not insist upon the immediate payment of the debt then actually due.

Now that was a contract which Mrs. McArthur was not entitled to break, without consent of the National Bank. For reasons not explained, she chose to apply to another bank—the Union Bank—for advances, while it appears by the result that there was no necessity for doing so, on account of any reluctance on the part of the National Bank to continue to accommodate her. The Union Bank agreed to grant her accommodation upon condition of her executing an assignation in their favour, which she did, of "All and whole my right, title, and interest . . . . in and to the lands and others hereinafter described, under and by virtue of the right of reversion, or other right belonging to me, arising out of" the absolute disposition to the National Bank and the back-letter. There was laid before the Union Bank this absolute disposition and the back-letter; and the assignation in favour of the National Bank was specially excepted from the warrandice. The word "fraud" has been tossed about in this case in a very unnecessary manner. So far from the conduct of any of the parties deserving the application of that often abused and misapplied word, the very reverse is the case. Everything was done openly

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and above-board by the two banks, and by Mrs. McArthur. She disclosed her whole condition to the Union Bank, and, with their eyes open, that bank took the assignation from her which she gave; she being perfectly willing to borrow money from both banks if they thought fit to make advances to her. To accuse the National Bank of fraud because that bank continued to make advances after the intimation of the assignation by the Union Bank, and to claim priority for such advances, appears to me to be a very absurd charge. What the Union Bank obtained by the assignation was, all that remained in Mrs. McArthur when the claims of the National Bank were satisfied. But what was it that did remain with Mrs. McArthur when these claims were satisfied?—only the value of the property after discharging liability for advances made by the National Bank —made in terms of the bargain—made between that bank and Mrs. McArthur, down to the last moment that they stood vested in the property conveyed to them. The Union Bank saw the risk they ran,—of perhaps obtaining nothing from the reversion; and the result has been that the reversion will carry nothing. But I cannot understand how, upon any ground in law or equity, a party like the Union Bank, entering into a purely speculative transaction like this, can maintain that they, by simply intimating an assignation from a person bound to another bank in a particular bargain, can upset that bargain without that other bank's consent.

There was a mode in which the action of the National Bank could be stopped, and that was by simply recording the back-letter in the public register. Mere intimation or notice that Mrs. McArthur had been trafficking with the Union Bank had no effect whatever in restraining the hands of the National Bank. Notice of another's right seems to be of great importance in England: but in Scotland, where we judge of the title and rights of parties as they appear on record, notice has no no effect whatever, in the absence of fraud. But I shall refer to this hereafter, when referring to the English decisions which have been relied upon.

But there has been mingled up with this question as to the construction of a contract, another question which had long ago excited some attention, but which I had thought had been answered satisfactorily, and the controversy about it set at rest. It appears not to be so, however, and I must refer to it. Indeed, it may become of importance if the reasoning in the English cases be held applicable to this case.

It is contended on behalf of the Union Bank that the right held by the National was merely that of a security holder; that the "radical right," as it is called, was in Mrs. McArthur; and that she was really and truly the proprietor, and the National Bank were mere encumbrancers upon her radical ownership; and therefore, when she assigned her right to the Union Bank, she assigned, or conveyed, or transferred the ownership of the heritable subjects. Now, let us see if this notion of "radical right" remaining with Mrs. McArthur is consistent with principle and authority.

Professor Bell is cited as an authority for this doctrine, but he is not in reality so. When he is explaining the law as to heritable securities, and stating the modes in which such securities can be constituted, he states that a security of a very effectual kind can be obtained by the mode of an absolute disposition, qualified by a back-letter. But he does not lay it down that the absolute disponee is merely a secu-

rity-holder. The late Lord Moncreiff, however, in the case of *Gardyne* v. *Royal Bank of Scotland* (13 Court Sess. Cas. 2nd Series, 912), lays down this doctrine, and it is by reason of his great authority that such a notion as to the character of an absolute disponee has so long lingered among us. "This point," he says, "was surely determined in the most deliberate manner in the case of *Bartlet* v. *Buchanan* (February 21, 1811, 16 F. C. 200), in which it was held that a widow's right of terce remained untouched by such an absolute disposition with infeftment, qualified by a back-bond recorded. The Court unanimously found that the husband's infeftment remained entire, subject to the heritable debt, without which there could have been no terce, the husband's seisin being the measure of the wife's terce." An opinion of Lord Moncreiff's deserves the most respectful consideration. But this opinion stands alone; and the case of *Bartlet* v. *Buchanan*, as will be hereafter shewn, does not support the conclusion here drawn from it. In the case of *Gardyne*, where Lord Moncreiff expressed his opinion, seven judges concurred in laying down this as law, in regard to an absolute disposition (13 Court. Sess. Cas. 2nd Series, at p. 939): "The fallacy on the other side lies, in dealing with the right of the bank, as if in legal construction it were one of security only, and not of proprietary right. That in one sense (though not in the ordinary sense) it may operate to the effect of a security, is true enough. But in its conception and legal constitution it is not a security—which is a mere burden in favour of one party, on the radical jus dominii continuing separately to exist in the person of another. It is, on the contrary, the proper jus dominii itself, transferred, by divestiture of the former, into the person of the new proprietor; who in this way comes, by independent investiture, into his author's place, quoad the entire substance and universitas of the real right." A brief analysis will, it is thought, shew how the case really stands." The reasons that the judges give for their opinion are stated at length, and it is unnecessary to repeat them here. Their opinions are in accordance with the opinions of their predecessors and successors—the import of all of them being that the absolute disponee, although his right be qualified by a back-letter declaring that right to be in security, was the proprietor and vassal, and that the transaction between him and the disponer was nothing but a pactum de retrovendendo, as that is explained by Voet (18. 3. 7) and Erskine (3. 3. 12). The point is also stated by Lord Curriehill in the case of *Campbell* v. *Bertram* (4 Court Sess. Cas. 3rd Series, 28). And by Lord President M'Neill, in the case of *Leckie* v. *Leckie* (17 Court Sess. Cas. 2nd Series, 80).

It is needless, however, to multiply these citations; they are numerous, and by many judges, and all to the same effect. The point, however, does not rest upon mere general statements of judicial opinion. The decisions exhibit in the clearest way the distinction between an ordinary heritable security and a conveyance by absolute disposition. A mere security-holder has no right, until the principal sum or the interest be not paid, to enter into possession or draw the rents. But a disponee under an absolute disposition has full authority to enter into possession, and has the exclusive administration and control of the subjects.

I will here give, under eight heads, illustrations of the law that an abso-

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lute disposition, though qualified by a back-bond, confers a totally different and higher right upon the disponee than what is obtained by a creditor in a heritable security.

(1.) He may remove the disponer from the lands, and may demand from the tenants immediate payment of the rents, on the footing that he is proprietor (*Rankin* v. *Russell*, 7 Court Sess. Cas. 3rd Series, 126).

(2.) The trustee in a sequestration of the disponer's estates cannot oust the absolute disponee from possession (*Hay's Trustees* v. *Davidson*, 15 Court Sess. Cas. 2nd Series, 583).

(3.) The holder of an absolute disposition cannot poind the ground, as a security holder may do; and this because he is the proprietor (*Scottish Heritable Security Co.* v. *Allan & Co.*, 3 Court Sess. Cas. 4th Series, 333).

(4.) By the Act 1696, chap. 5, it is enacted that dispositions or other rights granted "for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following on the said disposition or right." Under this statute it is decided, as stated by Professor Bell, that a heritable security "could not cover a debt contracted after the sasine or infeftment."

Now, if the view be correct that the right in favour of the National Bank is nothing more than a security,—that the title is a mere form, and that the Court must look at the transaction in the same way as if it had been an express disposition in security, then it must follow that the National Bank is not entitled to retain Mrs. McArthur's property for one farthing of the debt contracted by her subsequent to the date of the recording of the disposition to them. But it is settled law that an absolute disposition qualified by a back-bond, does not fall under the Act 1696, c. 5, like a bond and disposition in security: (*Riddel* v. *Niblie's Creditors*, 16th February, 1782, M. 1154; 2 Ross, Leading Cases, p. 721).

(5.) A disposition expressly in security, and so qualified in the deed, can never become by any prescription a disposition in absolute property (Ersk. 3. 7. 10; 3 Ross, Leading Cases, p. 467, per Lord Braxfield). On the other hand, where there is a disposition and sasine (or recording—equivalent to sasine), ex facie absolute, with possession for the prescriptive period of forty [now twenty] years, the party so infeft is entitled to the absolute property, although it had been conveyed to him or his author, qualified by a back-bond conferring on the disponer a power of redemption. The Court held that the back-bond unrecorded was cut off by the negative prescription (*Chambers* v. *Law*, 6th June, 1823, 2 Court Sess. Cas. 1st Series, 366).

(6.) In order to give the absolute property to the disponee in the case of an absolute disposition, qualified by a back-bond, all that the disponer would be obliged to do, would simply be to discharge or renounce the personal obligation to reconvey. A feudal conveyance of the property would not be necessary, for this simple reason, that the disponee is already feudally invested in the property, and all that he requires is, to get the disponer to discharge, or to throw into the fire, the personal obligation which qualifies the right. It is quite different with regard to a title *ex facie in security*. The creditor under such a title having made a bargain with the debtor by paying him a further sum of £36, obtained from him a formal *discharge* of the right of redemption, whereby he declared "the

subjects to be irredeemable by me and my heirs in all time coming." This writing was recorded in the register of reversions, in virtue of a clause to that effect. No disposition was granted by the debtor to the creditor. The debtor having died, the creditors of his heir adjudged the property. The creditor in the bond claimed the subjects as his absolutely; the creditors of the heir, on the other hand, holding the discharge to be ineffectual to change an *ex facie security* title into one of *absolute property* by mere declaration that the right was to be irredeemable, and that the right of redemption was discharged—claimed the property, except in so far as it was burdened with the original security. The Court held that the discharge of the reversion did not convert the heritable bond and disposition in security into an absolute conveyance, and so preferred the heir's creditors (*Miller* v. *Drummond*, Hume, 662). It thus appears, again, that the title in this matter is the substance; for, if both be securities to every purpose, how comes it that such very different rules are applicable to the same case?

(7.) A heritable right ex facie in security may be worked off or discharged without any reconveyance, or even any deed of discharge, and simply by payment, for it is nothing but a burden (Ersk. 2. 8. 34). But all this is quite different with regard to an absolute disponee. Although the sum lent by him be paid, his right as owner of the property is not disturbed—nay, even a *renunciation* or *discharge* by him is ineffectual. There must be a reconveyance—a disposition followed by infeftment—or its equivalent—recording of the disposition. "Mere renunciation," say the consulted judges in *Gardyne* (13 Court Sess. Cas. 2nd Series, 941), "cannot operate feudal divestiture." (See also Lord President in *Scottish Heritable Security Company* v. *Allan Campbell & Co.*, 3 Court Sess. Cas. 4th Series, 340.)

(8.) Another marked distinction between the two rights of absolute disposition and heritable security is found in the law of succession. When the absolute disponee dies, his heir-at-law and not his executors come into his place. It is different, however, with regard to *heritable securities*. It is enacted as regards them by the 117th section of 31 & 32 Vict. c. 101, that no heritable security shall after the date of that statute be "heritable as regards the succession of the creditor in such security, and the same . . . shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives in mobilibus." Now the words "heritable security" in this statute are defined by sect. 3 to be "heritable bonds, bonds and dispositions in security, bonds of annual rent, bonds of annuity . . . and all deeds and conveyances whatsoever legal as well as voluntary which are or may be used for the purpose of constituting or completing or transmitting a security over lands . . . but shall not include . . . *absolute dispositions qualified by back-bonds or letters*." These dispositions are to remain heritable estate, and the property must go to the heir-at-law.

Now, what is opposed to all this train of authority?—only the case of *Bartlet* v. *Buchanan* (21st February, 1811, 16 F. C. 200), which now, therefore, requires to be examined. This case has been very imperfectly reported, and the decision does not warrant the general doctrine that has been deduced from it. The case, as appears from the Session Papers, was

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decided upon specialties, which renders the decision useless as a precedent in regard to this question. The facts were these: there was an absolute disposition by William Buchanan, the proprietor of Auchmarr, in favour of Andrew Buchanan. This disposition was qualified by a back-bond, granted by Andrew Buchanan, whereby he declared that "although the foresaid disposition bears to be absolute and irredeemable, and granted for a price paid, yet the truth is, that the same was granted only as a security to me for the repayment of £1200 sterling, instantly advanced and paid by me to him, and of the lawful interest of the said principal sum, from this date till the said principal sum is repaid to me, with the expenses, &c., and on repayment at any term before Martinmas, 1793," Andrew, the disponee, bound himself to reconvey the lands. The back-bond was recorded in the register of sasines on the 14th of September, 1789, and *it was not till three days thereafter*—namely, the 17th of September—that sasine was taken on the absolute disposition; and nine days thereafter—namely, the 23rd of September that the sasine was recorded. Thus the back-bond was recorded in the register of sasines before Andrew Buchanan's right was made real by infeftment. Consequently, at the very time when the disponee's right was completed, there was upon the record the declaration that it was only a security for £1200; and thus the case falls precisely within the decision of *Keith's Trustees* (2 Ross, Leading Cases, 723), referred to and explained by the Lord Justice Clerk in his opinion.

At the term of Martinmas, 1793, the £1200 was not paid. William Buchanan, the disponer, was lost at sea in the year 1797, and was succeeded by his brother James, who served himself heir, and thus became vested in the heritage of the deceased. On the 28th of July, 1803, James Buchanan, in consideration of a sum of money paid to him, and a bond granted for £1000, renounced the right of reversion of the lands of Auchmarr under the back-bond; and thus the restriction upon Andrew Buchanan, the disponee's, right was discharged.

It appears that the heir of the deceased William Buchanan had conspired with Andrew Buchanan, the disponee, to defeat the legal rights of William's widow to her terce and jus relictæ. The widow consequently pleaded that there was collusion between the heir of William Buchanan and Andrew Buchanan, the absolute disponee, and that they were attempting by fraud to deprive her of her terce; she maintained that "the pretended discharge of the right of redemption in 1803 (granted by William to Andrew Buchanan) was in substance the result of a combination between these two parties to defraud the pursuer of her right of terce"; and her argument was this—that the general rule no doubt is, that "the husband's sasine is the measure of the terce. But from this there is an exception in all cases of fraud or wilful omission," and she referred on this subject to Erskine (2. 9. 46); and she further maintained that, as it was proved by the back-bond that William's disposition was only a security for £1200, "it was, in so far as it appeared to be absolute, gratuitous quoad ultra," and that, therefore, it could not deprive her of her right to terce according to the doctrine laid down by Erskine that it is a fraud "where the husband, not having provided for his wife by marriage-contract, divests himself in favour of his eldest son *or other heir*."

The report in the Faculty Collection bears that "Beyond the extent of the £1200, the infeftment of the creditor was truly the infeftment of the debtor, and any other supposition would afford the means of *defeating the law*." There could be no other conclusion arrived at, seeing *that before the absolute title of the disponee was made real* there was put upon record the back-bond which limited his right to a security for £1200; and, therefore, the creditor, being thus shewn to be a security-holder merely, the Court sustained the right to terce. The decision proceeded also upon equitable considerations in favour of the widow, and, as stated by the consulted judges in the case of *Gardyne*, her claim was sustained "not in respect of any supposed investiture of her husband in the dominium utile." This decision was in accordance with many precedents in favour of widows' claims for terce, which has been always a favoured provision. Thus, although the general rule is that the husband's sasine is the measure of the wife's right, it has been held that, if his sasine should be reduced on the ground of the title having been erroneously made up, she would obtain her terce in any question with his heir (*Rose* v. *Fraser*. M. App. v. Terce No. 1 (1790); Bell's Com., vol. i., 7th ed., p. 57). So, in like manner, if a husband had refused to take infeftment for the purpose of depriving his widow of her terce, the Court would allow the claim (Ersk. 2. 9. 46; 1 Bell's Com. 57; *Blair* v. *Hamilton*, M. 15836 (1561); *Annandale* v. *Scot*, M. 15848 (1711)).

The result of all this is, that there was no radical right whatever in Mrs. McArthur, and that she had merely a personal action, to compel reconveyance of the property on satisfying the claims of the National Bank. Until these are satisfied to the utmost farthing, according to the bargain, she could not insist upon this personal action, and she could not convey to the Union Bank a higher right than she herself possessed.

English decisions have been referred to by the Union Bank as conclusive in their favour. I do not think that, in regard to this question of Scottish conveyancing, we can obtain any assistance from the English law,—the laws being so entirely different. By the law of England a mortgage debt is personal property, subject to all the incidents which appertain to such property (Williams on Law of Real Property, p. 499). By the law of Scotland the right of an absolute disponee is heritable estate, as it appears upon the records, and it descends to the heir-at-law, and not to the executors. By the law of England a deposit of title-deeds, even without any writing, operates as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds (Williams, p. 514). By the law of Scotland title-deeds of heritage cannot be made the subject of a security for a loan (*Christie* v. *Ruxton*, 24 Court Sess. Cas. 2nd Series, 1182).

The leading case more particularly relied upon as bearing upon the present case is that of *Hopkinson and Ors.* v. *Rolt*, finally decided by the House of Lords in 1861 upon appeal from the judgment of Lord Chancellor Chelmsford (9 H. L. C. 514, and 34 L. J. (Ch.) 468, affirming 28 L. J. (Ch. 41). [His Lordship read the facts and a portion of Lord Chelmsford's opinion.]

Now all this is totally inconsistent with the settled principles of Scottish law. In the *first* place, a heritable bond, or bond and disposition in

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security—equivalent to the English mortgage—could not be granted for any sum of money to be advanced upon it subsequent to the date of the recording of the sasine. Such is the express enactment of the Act 1696, c. 5; and it was because of the impossibility of granting a heritable security or mortgage for sums *to be advanced* which compelled conveyancers to resort to the entire divestiture by the owner, in the form of an absolute disposition.

In the second place, a person who is divested by an absolute disposition has no longer any power,—as a mortgagor has in England, to grant a second mortgage over the property. Being divested he cannot convey, and he cannot grant warrant to infeft. No doubt the owner of property in Scotland, after granting one bond and disposition *in security*, may grant other bonds subsequent thereto, and this because he was not, by the granting of a deed expressly in security, divested of the property, as he is when he grants an absolute disposition.

In the *third* place, the rule that advances must have priority according to the order in which they are made, is wholly inconsistent with the rule of Scottish law, that there can be no burden laid upon heritable property without appearing upon record. Observe that the assignation of the reversionary right in favour of the Union Bank was not, and could not be recorded in the register of sasines; and yet it is maintained that the Union Bank obtained for the advance they made a real security in the property in priority to the National Bank, who had infeftment duly recorded. This running a race for priority according to the date of each advance is quite inconsistent with the Scottish law as to heritable securities.

In the *fourth* place—in the absence of fraud, of which there is not any trace in the whole of these transactions—intimation of the assignation operated nothing in restricting the rights of the National Bank. The only way in which such a restriction could be imposed upon them was by recording the back-letter or producing it in judgment, as in the case of *Keith's Trustees*. The question is not raised in the present case, whether, seeing there was no *specific* sum limited in the back-letter, such recording or production in judgment would have put a stop to any further advance being made by the National Bank, as Professor Bell thinks. Or whether, notwithstanding the recording of the back-letter, that bank still remained proprietor, as was laid down in *Scottish Heritable Security Company* v. *Allan, Campbell & Co.* (3 Court Sess. Cas. 4th Series, 333), and could still continue to make advances till a reconveyance was executed. Be this as it may, the only mode of putting a stop to the operations of the National Bank, with reference to advances, was by recording the back-letter or producing it in judgment; and the intimation of the assignation in favour of the Union Bank was not equivalent to this.

I have never found it profitable in the study of the real property law of Scotland, to endeavour to obtain light in regard to it from the real property law of foreign countries. In regard to real property law each country has its own special history and technicalities, without thoroughly knowing which, a foreign student might find himself landed in grievous error. Still less do I consider it profitable or sensible to endeavour to apply the law of a foreign country as to *personal* estate, to the peculiarly technical system of Scottish conveyancing as to heritable property.

LORD TRAYNER :—I think the questions raised for decision by this special case must be decided according to principles of Scotch law. I say so, because in the minute of debate for the Union Bank reference is made to, and stress laid upon, certain decisions in England as applicable to this case. I venture to think that they are not applicable. So far as I am aware the practice of making advances on the security of a conveyance ex facie absolute, qualified by a back-letter, is not known in England, although well known in Scotland, and attended, according to the law of Scotland, with certain well-known consequences. On the other hand, the practice of taking an ordinary security title for future advances, as is done in England, cannot effectually be done in Scotland at all.

Further, from the English cases cited, it appears that in England a system is adopted of ranking preferences between competing mortgagees or security-holders quite unknown in Scotland. I think, therefore, that the English cases, proceeding upon principles peculiar to the law of England, applied to circumstances essentially different from those of the present case, afford neither authority nor assistance in the decision of the present question. The shape which the transaction between Mrs. McArthur and the National Bank took, resulted in the latter becoming heritable proprietors of the subjects conveyed. The qualifying letter or back-bond was not recorded; but if it had, it would not have made the National Bank any the less proprietors of the subjects. "The back-bond did nothing more than this—it shewed that under certain conditions the present proprietors of the subjects" (in this case the National Bank), "were bound to convey the subjects to somebody else; but it did not make them one bit the less for the time absolute proprietors of the subjects" (Per Lord President in *Scottish Heritable Security Co.* v. *Allan*, 3 Court Sess. Cas. 4th Series, 340). The condition on which the National Bank was bound to reconvey the subjects, was "full and final payment of all sums of money now due" (i.e., at the date of the conveyance), "or which may hereafter become due by the company firm of William McArthur & Co.," or the individual partners of that firm. On a transaction such as that no question of difficulty could have arisen between the National Bank and Mrs. McArthur as to their respective rights in the subjects conveyed.

But about six months after granting the conveyance I have referred to, Mrs. McArthur granted in favour of the Union Bank an assignation of the right of reversion or other right belonging to her arising out of the said conveyance and back-letter. That assignation was intimated to the National Bank; and the question arises, whether after such intimation the National Bank was entitled, in reliance on the conveyance they had received, to make further advances to the debtor, or whether they were not thereby prevented from making such further advances, to the prejudice of the right conferred, by the assignation, on the Union Bank. The answer to these questions depends upon the view which may be taken of the right conferred upon the Union Bank by the assignation, and that depends upon what the cedent had to give. Mrs. McArthur had parted with the property, and accordingly she could not give any right to it. She had only a right to demand a reconveyance on the conditions above specified being fulfilled, and that was the right she conveyed to the Union Bank. With that right

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no one seeks to interfere. When the whole advances made by the National Bank are repaid, the reconveyance will no doubt be executed.

But the Union Bank maintains that the assignation, on being intimated, prevented the National Bank from doing anything thereafter which would make the reversionary right then assigned less valuable to the assignee than it was at the date of the assignation. I feel the force of this argument, and it presents the only difficulty I have had in the case. To give effect to that argument, however, one must first get rid of the contract between Mrs. McArthur and the National Bank. By that contract the National Bank was entitled to advance what they pleased on the faith of the conveyance made to them. So long as advances were made, they were made on that condition; and no act of Mrs. McArthur's, without the concurrence of the National Bank, could take away that condition as a qualifying circumstance of any advance they made. Accordingly, the assignation to the Union Bank—to which the National Bank was not a party—could not take away or impair the force of that condition. The Union Bank knew the conditions on which the National Bank held the property, for the National Bank's title was set forth in the assignation, and excepted from the warrandice in the latter deed. If the Union Bank had desired to prevent any further advance being made, and consequent reduction in the value of the right assigned to them, they should at once have exercised their right of paying off the advances already made, and demanding a reconveyance. Except by this mode, I do not think they could effectually hinder the subjects being further burdened with advances by the National Bank.

It is further said the National Bank was in bad faith making further advances after the intimation of the assignation. I think there was no bad faith in the matter. They acted on what they considered (and what I consider) was their legal right. And they were doing no injury to the Union Bank, whose right (being their cedent's right) was only to get a reconveyance after *all* advances—past or future at the date of the conveyance—had been repaid. This is not refused.

The Union Bank maintains, also, that the right conferred on the National Bank, looking to the back-letter, was in substance, whatever it might be in form, a security only; and that if it was a security only, they (the Union Bank) are entitled to succeed. In one sense no doubt the transaction was one of security. The National Bank were secured in the repayment of their advances; but they had more than a security title. They were made proprietors for the time being, and this distinction is very important. For, otherwise, one who lends on an absolute conveyance would be in no better a position than one who lends on a mere security. If the National Bank had nothing but a security, (in the technical sense) cadit quæstio, for a security, properly so called, does not cover future advances at all. To give effect to the contention of the Union Bank would practically result (as it appears to me) in holding that the National Bank's title, ex facie absolute, was nothing more than a security, with nothing but the privileges of a security; while the assignation to the Union Bank, ex facie the conveyance of a reversionary right, if there was a reversion, must be treated as if it were an absolute conveyance of the property itself. The case of *Bartlett* v. *Buchanan* does not aid the Union Bank when

properly regarded. I do not repeat, but refer to the explanation of the grounds of that decision as given in the opinions of the consulted judges in *Gardyne* (13 Court Sess. Cas. 2nd Series, 942).

The opinions of the judges of the First Division in favour of the Union Bank were, inter alia, as follows :—

LORD SHAND :—Although the question raised in this case has led to a serious difference of opinion, it seems to me to be a question short and simple in its nature. Is a creditor who holds a property on an ex facie absolute title of ownership,—but in security only of advances made and to be made to his debtor,—entitled to hold the property for repayment of advances made voluntarily after he has received notice that his debtor has, for valuable consideration, conveyed his reversionary right to the property or to its proceeds to another? The simple point to be determined is the effect of such a notice, for, of course, without notice or knowledge of the later conveyance, it is clear that the creditor may retain the property to meet all advances made down to the date when a reconveyance is asked. I am of the opinion expressed by the minority of the consulted judges. I think the principles fully and clearly stated by Lord Rutherfurd Clark and Lord Kinnear are sound. Moreover, I think the point in controversy has been expressly decided by the House of Lords, in what I may call a leading case—the case of *Hopkinson*, in 1861 (9 H. L. C. 514).

It must be conceded that after Mrs. McArthur, in February, 1879, had conveyed her property to the National Bank, and had received the secretary's letter agreeing to hold the disposition on the terms stated in her letter of the 12th of February to the bank, there remained in her a valuable beneficial right in relation to the property. What may have been the proper technical nature or description of that right seems to me of no materiality whatever to the present question. It was a right of value. As such it was capable of being conveyed or assigned by Mrs. McArthur to a third party, and of being attached by the diligence of her creditors, or carried by a sequestration to a trustee in bankruptcy. The terms on which the bank by their secretary's letter agreed to hold the property conveyed to them were thus expressed: "In security, and until full and final payment of all sums now due, or which may hereafter become due," by the firm of which Mrs. McArthur was a party, and its two partners. The value of the right which Mrs. McArthur still possessed was to be measured by the difference between the amount advanced, or for which the bank was liable on Mrs. McArthur's account at any given date and the worth of the property beyond this sum. So long as the advances and obligations undertaken by the bank were of less amount than the value of the property, it of necessity followed that Mrs. McArthur had a right of value, and whatever may be the legal category under which that right would properly fall, it cannot admit of doubt that it might be attached by diligence or conveyed to another. The opinions of your Lordship and Lord Mure, and of the other learned judges who think the National Bank right in their contention, contain much careful argument intended to establish the proposition that the bank, after getting the conveyance from Mrs. McArthur, became proprietors of the property she had conveyed to them. In much of what has been thus stated

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I entirely concur; and indeed, for the purpose of the decision in this case, so far as I am concerned, I should concede it all. For after all that has been so said has been conceded, every one is nevertheless agreed that Mrs. McArthur had a reversionary right. For example, my learned brother, Lord Fraser, after a very full examination of the cases, concludes: "The result of all this is that there was no radical right whatever in Mrs. McArthur, and that she had merely a personal action to compel reconveyance of the property on satisfying the claims of the National Bank." Your Lordship, as I understand, takes the same view. Well, taking it so, Mrs. McArthur had certainly the right to get back the property itself, worth it might be £2000 or £3000, on paying the amount for which she was liable to the bank, which might be only £1000 or £1500; and if the bank used the power of sale which they possessed, either under their title of ownership or under the express terms of Mrs. McArthur's letter, which gave them that power, the balance of the price, after meeting that indebtedness, belonged to her. These rights may, I think, be quite properly described as reversionary rights; for I do not agree in the justice of the criticism by your Lordship of the use of that term.

The circumstance that Mrs. McArthur had this right of reversion, by virtue of which she might either regain the property on paying the advances made, or receive the balance of the price if the property were sold, makes it clear, that, though the bank held the property as owners under a property title, with all the powers of owners, including a power of sale, this ownership was only to cover a debt due or to become due. It was the ownership of a property, no doubt; but that ownership was "in security" only, as indeed the explanatory letter expressly bears.

Now, on the 13th of August, 1879, Mrs. McArthur assigned or conveyed her reversionary right to the Union Bank of Scotland for onerous considerations, and due notice of this was given to the National Bank. It might be contended that the true meaning and effect of this assignation or conveyance was merely to give right to the reversion, if any, which might remain after the National Bank should have continued thereafter to go on making farther advances of such amount as might be arranged between Mrs. McArthur and them; but this contention is plainly inadmissible. The transaction with the Union Bank was onerous, and the deed conveyed Mrs. McArthur's right, title, and interest, claim of right, property, and possession, petitory as well as possessory and "of what kind or nature soever, which now belongs, or which may hereafter belong to me." It would be an extravagant construction to put on this onerous deed, that it only conveyed Mrs. McArthur's right, subject to a power on the part of herself and the National Bank to destroy the right altogether, by rearing up claims for which the property or its price would be liable, by means of future advances to be given to Mrs. McArthur by the bank, though under no obligation to make such advances. The assignation must be construed as a conveyance of the reversionary right as it stood at the date of the intimation to the National Bank.

What, then, was the position of parties after the intimation? Until notice of that deed was given to the National Bank, they were entitled to make such advances beyond the

amount already given as they thought fit, and were safe in doing so, in reliance on the reversionary right which Mrs. McArthur had, or, in other words, on the value of the property not exhausted by prior advances. But so soon as she parted with that right, and they had notice that the Union Bank had acquired it for value, surely they could no longer make advances to her, with the result of burdening or affecting a right which they knew no longer belonged to her, but had been acquired by the Union Bank for value.

The argument for the National Bank seems to be based on the view that the bank had somehow an indefeasible right, with the view of earning profits, to go on making advances which should affect the right of reversion which Mrs. McArthur had under her arrangement with the bank, even after she had disposed of that right to the Union Bank for value—a right to the future business of a valuable customer from whom they had got a security. How the National Bank could possibly acquire such a right I cannot see. The arrangement made did not bind Mrs. McArthur to take any amount of future advances, or to continue to do business with the National Bank. The reasoning admits of being tested by two illustrations, either of which seems to me to demonstrate its unsoundness. Suppose that after a certain amount had been advanced by the National Bank, a creditor of Mrs. McArthur had by diligence attached her reversionary right in the property or its proceeds—could that bank possibly, in disregard of the diligence, have gone on voluntarily to make advances to Mrs. McArthur or on her account, which would affect and even sweep away the reversion, and so defeat the diligence; and could it really be said they had such a right, in order that they might earn banker's profits under their agreement with Mrs. McArthur? To admit such a right would simply be to give to Mrs. McArthur, as a fund of credit, a property or reversion which her creditor had attached, and, as I should say, clearly secured for payment of his debt. It seems to me to be too clear for argument that a creditor's diligence could not be so defeated; and if so, what becomes of the supposed indefeasible right of the National Bank under its contract with Mrs. McArthur to go on making advances which should affect her reversionary right after that right no longer belonged to her?

Again, suppose that besides selling the reversionary right, which is perhaps the plainest case that can be put, or assigning it for value, Mrs. McArthur, in the deed of assignation, had expressly bound herself, in respect the reversion was no longer hers, neither to ask nor accept any farther advances from the National Bank, which could affect the property or its proceeds, and that this obligation had been intimated to the National Bank. Could it be maintained that nevertheless the bank could, on the notion that they had acquired an indefeasible right to the future business of a valuable customer, go on to make advances and secure themselves for the amount of these out of the property, to the prejudice of the persons who had acquired right to the reversion? If not, and I think it clear they could not,—again, what becomes of the supposed indefeasible right of the bank to go on making the advances, which are here the matter in dispute, on the footing that these were secured? The last case I have supposed appears to me to be really the case in hand. For although there

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was no express undertaking by Mrs. McArthur to refrain from asking or obtaining further advances from the National Bank on the security of her reversionary right after she had conveyed that right for value to the Union Bank, the nature of the transaction and conveyance implied an undertaking of this kind, and the notice of the assignation to the National Bank was notice of this undertaking.

Accordingly, I hold that after the notice to the National Bank of the assignation of Mrs. McArthur's right, the bank could no longer go on to make further advances to her on the security afforded by their title of ownership to the property. On this part of the case I must add that I do not think the principle to be applied in the case of a heritable property is in any respect different from the principle applicable in the case of a moveable subject—e.g., a cargo of grain, or any other moveable property given in pledge as a security to cover past and future advances precisely on such terms as were expressed in Mrs. McArthur's letter to the bank in this case. Nor can it make any difference that the title to the heritable property given in security is in form an absolute conveyance in favour of the creditor, in place of a mortgage or heritable bond in security, if it be assumed that this form of security could be used according to our law to cover future advances of indefinite amount. The heritable bond might be for any sums not exceeding in all a sum named, being the full value of the property. In any case, the creditor would be possessed merely of a security intended to cover future advances (the agreement expressly bears that it is so in this case), and if the debtor's right to the subject of the security be sold or transferred for value, and notice of the transfer be given to the creditor, it seems to me to follow of necessity that the creditor can no longer make advances to his debtor which can affect the subject of the security.

In coming to this conclusion as the result of the legal principles applicable to the case, I do not for a moment attribute any wrong motive to the National Bank for the position they have assumed. If they, or rather their officials, who went on making advances to Mrs. McArthur after she had conveyed her reversionary right to the Union Bank, and they became aware of this, had realised to themselves the full legal effect of this conveyance, I should certainly say they were acting wrongly in continuing to make advances under the idea these would be secured, and wrongly in maintaining their present contention. They should in that case have "held their hand," and declined to give further advances, for the simple reason that they were giving advances to one person on the security of property belonging to another, and so wrongly taking advantage of the form of a title which seemed to enable them to do so. But the truth of the case probably was that the officials of the National Bank did not fully realise that their debtor had divested herself of her reversionary right, as it stood at the date of the deed in favour of the Union Bank, but had erroneously read the deed as giving a right to a future reversion, leaving them free to deal with Mrs. McArthur in the meantime. Assuming, however, that they did act on this view, which was clearly a mistaken view of the meaning and effect of the deed of August, 1879, they, and not the Union Bank, must be the sufferers.

While I think the case is clear in

principle, I am bound to add that I hold the question in controversy to have been settled, by the highest authority, in the case of *Hopkinson* (9 H. L. C. 514). [His Lordship read the facts.] The principle of the decision is thus stated by the Lord Chancellor Campbell at p. 534 of 9 H. L. C. [Read.] These words, and the principle which they embody, are directly applicable, as it seems to me, to the present case. The sole distinction, in fact, is that in this case the earlier creditor, the National Bank, had a security in the form of an absolute conveyance, and that the debtor's right or interest was to demand a reconveyance; while in the case of *Hopkinson*, the debtor had still a title of property in the subject of the security, burdened only by the first mortgage he had granted. All the same, the creditor's right in both cases—in the case of *Hopkinson* and in this case—was one of security, and in both cases the debtor continued to have a valuable right in relation to the property. In *Hopkinson's Case* it was held he could dispose of that right to a third party, and that any advances by the bank after notice of the second mortgage were bad in a question with the second mortgagee. So here it follows that Mrs. McArthur, having assigned the reversionary right which she had, the National Bank, after getting notice of the assignation, could no longer make advances to their debtor to diminish or effect the reversion which she had for value conveyed to another.

The case of *Hopkinson* has ruled the other cases cited for the Union Bank. The case of the *London and County Banking Company* v. *Ratcliffe* in 1881 was also decided in the House of Lords (6 App. Cas. 722); and there a banker, with whom title-deeds had been deposited by the owner of the estate, was held not entitled to hold the deeds for advances made after knowledge that the estate had been sold; and the opinions of Lords Selborne and Blackburn proceed on the doctrine settled in the case of *Hopkinson* twenty years before. Mr. Justice Field acted on the same view in the recent case of *Briggs & Co.* (29 Ch. D. 149; sustained by H. L., which reversed Court of Appeal (31 Ch. D. 19), 7 Dec. 1886, see ante, p. 29), and Lord Romilly also, in the case of *Menzies* v. *Lightfoot* (Law Rep. 11 Eq. 459), gave effect to the principle laid down in the case of *Hopkinson*. The first two of these authorities have, as it appears to me, finally settled the rule which ought to be applied in this case. The application of that rule is not dependent on technicalities or specialties of English conveyancing law. The rule itself rests on a broad principle as to the effect of notice to a creditor holding a security given to be made available for future advances; and the principle is, that after notice of the transfer for value of the debtor's right or interest in the subject of the security (whatever be the nature of that interest), future advances by the creditor cannot be made to affect that interest, which, in the knowledge of the person making the advance, is no longer the right or interest of his debtor.

I must be allowed to add, with reference to the view which your Lordship has expressed,—that it would be a calamity if this case were decided in favour of the Union Bank,—that, with the utmost deference to your Lordship's opinion, I think it could not be a calamity if the law were now declared, as I think it ought to be, that bankers are not entitled, under any form of title, to give advances which shall be held as secured, though given to one

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person on the security of property which to their knowledge has been purchased or acquired for value by another. And as the law has been settled and in operation for the last twenty-five years in England in the regulation of the large banking transactions which occur there, in accordance with the principle for which the Union Bank contends—a principle which has justice and equity for its basis—it can be no calamity, but a benefit, that the law of this country should be declared to be the same. Indeed I think the Union Bank, when they entered into the transaction which is the subject of this case, were entitled to rely on the authority of the case of *Hopkinson*—on the principle there settled—as excluding the argument which has been maintained so successfully in this Court against them.

On these grounds I am of opinion that, both on principle and clear authority, the case of the National Bank fails, and the queries in the special case should be answered in favour of the Union Bank.

LORD ADAM:—The grounds of my opinion in this case are so clearly expressed by Lord Rutherfurd Clark and Lord Kinnear, that I have very little to add.

What Mrs. McArthur assigned to the bank was her right of reversion as at the date of the assignation; and, accordingly, the bank were bound to reconvey the subjects to the assignees upon payment of the sums then due to the bank. It is equally clear that if Mrs. McArthur had proposed to pay these sums, and had asked a reconveyance to herself, the bank could not have granted it, but if their contention be sound, they were perfectly entitled to pay or advance to her the full value of the reversionary right, as it stood at that time, and so render the assignation to the Union Bank entirely nugatory. This appears to me to recognise a right on Mrs. McArthur's part, if not in form, certainly in effect, to sell or assign her right of reversion a second time.

It appears to me, that after the intimation of the assignation of the reversionary right, the National Bank held the disposition of the subjects in their favour for the assignees, subject to payment of all sums which they had up to that time advanced to Mrs. McArthur or her firm, and subject to all sums that they might thereafter advance to the assignees if they chose to make such advances. The contention of the National Bank, accordingly, if sound, seems to me to imply a right to charge against the reversion advances both to the assignor and the assignees at one and the same time. A construction of the contract between the parties, which leads to these results, does not recommend itself to my mind.

No doubt, as the back-letter bears, Mrs. McArthur agreed that the National Bank should hold the disposition in security, and until payment of all sums of money then due, or which might thereafter become due, by her or her firm to them. But it was entirely within her option whether any sums should thereafter, in respect of this stipulation, become a charge on the reversion. If she did not borrow further sums from the bank, the bank suffered no prejudice. Moreover, it was only because she was at the time in right of the reversion, that the clause had any sense or meaning. It was only because she was in right of the reversion that she could agree that the bank should hold the disposition subject to her debts. Accordingly I think

that when she gave notice to the bank, as was done by the intimated assignation, that she had parted with the reversion, it was equivalent to giving them notice that they thereafter held the disposition for the assignees, and not in security for any future debts she or her firm might incur. I think that her "Agreement" that the bank should hold the disposition in security for payment of sums of money due by her or her firm, was the counterpart of the obligation of the bank to convey, on payment of such sums, the subjects to her, and when, in consequence of the assignation, she ceased to have right to demand a reconveyance of the subjects to herself, so, I think, the corresponding right on her part to charge the reversion with debt, and of the bank to hold the disposition in security for such debt, also ceased.

In short, I think that after the assignation by which Mrs. McArthur substituted the Union Bank as her assignees, in her full right and place in the premises, she was, as regards this loan transaction, in no better position than any other third party, and consequently that the National Bank are not entitled to take credit, in a question with the Union Bank, for loans which may subsequently have been made to her or her firm. I think that she had no right to ask, or the National Bank to make, advances on the security of a reversion which, in the knowledge of both, did not belong to her.

Opinions of the consulted judges in favour of the Union Bank:—

LORD YOUNG:—I concur in the opinion of Lord Rutherfurd Clark. When a money-lender holds a security over the borrower's property by ex facie absolute disposition, the borrower is owner of the reversion, i.e., of so much of the property as may remain after satisfying the debt to the lender. The value of this reversion at any moment is the value of the property minus the loan upon it at that moment, and a future loan upon the property can only be on the security of this reversion. It is, I should think, not doubtful that the borrowing owner of the property may alienate the reversion at any moment, that is to say, may transfer to another his then existing right in the property, subject to the then existing loan to him on the security of it. Should he do so, it will, I should think, be admitted that he ought not thereafter to borrow on the security of the reversion which he has parted with and transferred to another. If, after parting with the reversion, he should nevertheless borrow money on the security of it, the lender (holding the security by ex facie absolute disposition) will not be affected if ignorant of the fact. But should the lender be aware of the fact, that is to say, be aware before he made the loan, that the borrower had parted with the reversion and could no longer honestly borrow on the security of it, I should think it clear that his security is not good against the true owner of the reversion merely by reason of the fact that it formally stands on the prior disposition. My opinion is probably sufficiently and safely stated in the proposition, that the holder of a security by ex facie absolute disposition, to whom a subsequent conveyance of the reversion has been duly intimated, is not thereafter in safety to make a further loan, and that if he does so his security will not avail for that loan against the disponee of the reversion. It is perhaps superfluous to say that the proposition would not hold in the case of a pledged estate, the pledgor of which had disponed his

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reversion subject to unlimited future loans to him by the pledgee on its security, and that the opinion which I have expressed implies the rejection of the notion that such was the character of the disposition of the reversion made and intimated in this case. I reject that notion, because it seems to me primâ facie unreasonable to suppose that a creditor would take a security from his debtor on the terms that he should be at liberty to render it worthless. There might conceivably be evidence of such an arrangement, but it would be remarkable, and I think there is none here.

LORD RUTHERFURD CLARK:—I do not think that we are concerned with any matters either of feudal principle or of feudal title. So far as these have been discussed they have given rise to no difference of opinion. The question in my judgment is: Whether the National Bank could make advances on the security of the subjects which were conveyed to them by Mrs. McArthur, after they knew that Mrs. McArthur had, for onerous causes, assigned her reversionary right in these subjects, either absolutely or in security.

The National Bank held a security merely. It was constituted by an absolute disposition, but in substance it was no more than a security. The radical right to the subjects which had been conveyed to them remained in Mrs. McArthur.

In form this security covers all the debts which Mrs. McArthur owed to the National Bank, whensoever or howsoever these were contracted. In form, therefore, it covers the debt to which this case relates. Hence the question is, as I have formulated it above, whether the National Bank can for this debt avail themselves of the security as against the Union Bank.

The first point to determine is: What did Mrs. McArthur assign to the Union Bank? She assigned "All and whole my right, title and interest, claim of right and possession, petitory as well as possessory, which now belongs, or which may hereafter belong to me," in the subjects which she had conveyed to the National Bank. If this means no more than that she assigned to the Union Bank such right as might remain to her after her account with the National Bank was closed, and that she retained full power to continue to operate on the security held by that bank, there is, of course, an end of the case. But I cannot attach any such meaning to the assignation: it was granted for onerous causes. It assigned the right "now belonging to me;" and I cannot construe that deed as meaning anything else than that she assigned to the Union Bank her reversionary interest as it stood in her person at the date of the assignation. Any other construction would be at variance no less with the obvious intention of the parties, than with the letter of the deed.

Next, was Mrs. McArthur entitled to grant such an assignation? I think that there can be no doubt that she was. As I have said, the National Bank held a security only, though it was in the form of an absolute disposition. Mrs. McArthur had the radical right. In my judgment she could sell or assign it as she pleased. Of course, she could do nothing to prejudice the National Bank. But to assign the reversion could not prejudice or injure the bank. The assignation could not affect in any way their security for such debts as existed at the date of the assignation; and while this interest remained entire, Mrs. McArthur, in assigning her reversion, was only dealing with what belonged

to her. Though the bank had an absolute disposition, they were not bound to make any advances to Mrs. McArthur or her firm; and Mrs. McArthur could, of course, limit the security to the debts existing at the date of the assignation, by abstaining from incurring any more.

The assignation to the Union Bank was duly intimated to the National Bank. By that intimation they were informed that Mrs. McArthur had parted with her entire reversionary right in the subjects which they held in security. The assignation was absolute in form, but they did not know whether it was an assignation in security or a sale. To my mind this is of no importance. What they did know was that the Union Bank were vested absolutely in the reversionary right which theretofore had belonged to Mrs. McArthur.

In this knowledge, they continued to make advances to Mrs. McArthur and her firm, and for these they claim the benefit of the security which they hold. It is to be observed that these advances were voluntarily made. The bank was not bound to make them, nor had Mrs. McArthur any right to exact them. But it is a certain consequence that if they are held to fall within the security, they diminish pro tanto the value of the reversionary interest which had been assigned to the Union Bank.

I shall first suppose that the assignation to the Union Bank had been granted in implement of a sale of the reversionary interest, and that this fact appeared on the face of the assignation. On that supposition, the National Bank knew that Mrs. McArthur had parted with the property. After selling her property, Mrs. McArthur had no right to contract any further debt upon it. To do so would be on her part a manifest fraud. But in lending to her, on the knowledge which I suppose them to have, the bank would be clearly a party to the fraud—at least if intended that the loan should be covered by the subjects which they held. For Mrs. McArthur could give no further security over them. The bank knew that she could not.

Nor to my mind does it make any difference if the assignation or the reversion be as here in security only. Mrs. McArthur was equally disabled from diminishing the value of the security which she had assigned. She could not thereafter impledge the subjects for any new debt. Having assigned her reversionary right as it stood at the date of the assignation, it would be a fraud on her part to diminish the value of that right by any subsequent act; and in the same way the National Bank, who were in the knowledge of the assignation, would be a party to the fraud if they concurred with her in any such act.

I am aware that the National Bank has the prior title, and that ex figura verborum they have a right to hold the subjects till every debt is paid which Mrs. McArthur may be due to them. But these debts must be lawfully contracted, as debts which are to fall within the security. No doubt there was nothing to prevent the National Bank from continuing to lend to Mrs. McArthur if they were so minded; but the question is whether she could accept the loans as debts which were to fall within the security. For the reasons I have already assigned, I think that she could not, and that, as the National Bank knew of her disability, they must be held to have been party to a fraud if they intended

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to claim for them the benefit of the security.

We have in our law cases where title will not prevail against right. An example, though not of common occurrence, is where a person takes a disposition to land and is infeft on it in the knowledge that his author had already granted another disposition of the same subjects. The second disponee has the first, and indeed the only feudal title, because the feudal title depends on priority of infeftment. But his title will not avail him against the right of the prior disponee, simply because he took a disposition which he knew his author had no power to grant, or, in other words, he knew that it was a fraud on the prior disposition. So here, the formal title of the National Bank cannot prevail against the prior right of the Union Bank, of which the former bank was cognisant.

It is said that the Union Bank having an assignation merely utitur jure auctoris, it can have no higher right than its cedent. That is quite true. But it has the rights of the cedent as at the date of the assignation; and these rights can, in my opinion, be diminished neither by the cedent nor by any one in the knowledge of the assignation.

There is a possible case in which Mrs. McArthur, after the date of assignation, might incur obligations to the National Bank by acts of which the bank had no knowledge, and to which they were not parties. It is not easy to imagine the circumstances out of which such obligations could arise; and I only mention the possibility to say that I am not dealing with it. For the ground of my judgment is, that the bank voluntarily and in the knowledge of the assignation made the advances for which they claim the benefit of the security.

On these simple, but, to my mind, satisfactory grounds, the Union Bank is, in my opinion, entitled to our judgment. I do not wish to detract from the value of a security constituted by absolute disposition, or to diminish its legal importance, and I do not think that I do so. I proceed on the ground that the National Bank are not entitled to avail themselves of their security for such debts as were incurred after they were in the knowledge of the assignation to the Union Bank.

LORD KINNEAR:—I concur in the opinion of Lord Rutherfurd Clark. There is no question as to the effect in law of a disposition ex facie absolute, qualified by a separate writing which has not been recorded in the register of sasines. It does not operate as a burden upon the grantor's title, leaving a real right in him; but completely divests him in favour of his disponee, and leaves him no other right but that of creditor in the disponee's obligation to reconvey. The disponee may be called upon to reconvey, upon the conditions stipulated in the back-bond, or other separate writing, but he cannot be compelled to perform that obligation until all the obligations incumbent upon the disponer towards him have been satisfied. This is perfectly well-settled law; and I do not understand it to be called in question.

On the other hand, it is equally clear that, although the right of property in the disponee is by his title absolute, it is effectually qualified in any question with the disponer by the personal contract between the parties. If the contract be, as in the present

case, that the subjects shall be held in security for advances, the disponee is bound to reconvey, upon payment of such advances as he has made; and if there be any question as to his right to retain for particular debts, the nature and terms of the transaction must be ascertained, and the question determined in accordance with the intention of the parties. "An absolute conveyance, with back-bond, though a trust and security most favourable to the trustee, is at best but a trust or security; and its terms, like those of any other transaction, are a fit subject of judicial inquiry" (*Robertson* v. *Duff*, 2 Court Sess. Cas., 2nd Series, 279, per Lord Fullerton.) The right of the disponee, therefore, is by title a right of property; but by contract, it is a security.

If these principles are sound, there can be no question as to the respective rights and liabilities of Mrs. McArthur and the National Bank, when the assignation in favour of the Union Bank was executed. She was entirely divested of her right of property in the subjects in question. But she was the creditor, under her contract with the bank, in their obligation to reconvey, when called upon, upon payment of whatever sums might then be due to them by Mrs. McArthur or her firm. That this was a right which she was entitled to sell and assign, or assign in security, as she thought fit, does not appear to me doubtful. For it is settled law that an obligation to convey lands may be transferred by assignation, duly intimated, as effectually as any other debt. It is true that she could not give her assignee a higher right than she herself possessed, or prejudice by her assignation the prior right already vested in the National Bank. But the right in her, at the date of the assignation, was to demand a conveyance, upon payment of the advances already made; and this appears to me to be the right which she assigned to the Union Bank. I think, with Lord Rutherfurd Clark, that to construe the assignation as meaning that she gave, not the right of reversion as it stood in her person, but such reversion as might remain at some subsequent date, after debt to an indefinite amount had been contracted to the National Bank, would be equally inconsistent with the terms of the document and with the nature of the transaction. It appears to me, therefore, that the right acquired by the Union Bank was a right to demand from the National Bank a conveyance of the subjects in question, upon payment of the debts already incurred by Mrs. McArthur or her firm; and that that right was effectually completed by intimation of the assignation. I do not think that intimating the assignation was equivalent to recording a back-bond in the register of sasines, for it left the infeftment of the National Bank unaffected; and third persons acquiring from them, in good faith and for value, would be still entitled to rely upon their absolute title. But it completed the transference of the jus crediti, which had been effected by the assignation, and placed the National Bank under obligation to give effect to the right which had been intimated (*Edmond* v. *Magistrates of Aberdeen*, 18 Court Sess. Cas., 2nd Series, 47).

The question is whether the bank, when they are called upon to perform that obligation, are entitled to retain for advances to Mrs. McArthur or her firm, made after they knew that she had been divested of her right of reversion, and to the prejudice of the

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assignees, to whom they knew that that right had been transferred. I am of opinion that they are not entitled to retain for such advances, because, from the moment when the assignation was intimated, they were precluded from relying upon the estate as a security for moneys lent to the cedent. It is no answer to say that they are the absolute owners of the subjects, and not merely heritable creditors. For the question is not as to their powers, while their right of ownership subsists, but as to the conditions upon which they are bound to divest themselves of that right; and that depends, not upon their recorded title, but upon the personal contract which imposed the obligation, and its bearing upon the transaction in respect of which they claim to retain. So long as the personal right under the contract remained vested in Mrs. McArthur, there can be no question that the bank would be entitled to retain for all advances to her or to her firm. But the effect in law of the intimated assignation was to divest her absolutely of all right under the contract (for the assignation is ex facie absolute), and to substitute her assignees as creditors in her place. She had ceased, therefore, to have any interest in the estate, at least in a question with the National Bank, or any title to sue upon the contract: and to sustain the claim of the National Bank in these circumstances is to allow retention as against the true creditor in the obligation, for debts incurred by a stranger to the contract. This appears to me inconsistent with the principle on which the right of retention comes into operation in such cases; for I think it is established by the case of *Robertson* v. *Duff* (2 Court Sess. Cas. 2nd Series, 279), and the previous cases examined, in the opinion of Lord Fullerton, that the right to retain for advances depends upon whether they were legitimately made, in reliance upon the security arising from the right ex facie absolute. If the bank had been under contract to make further advances, the case would have been different. But they were under no obligation to lend or the disponer to borrow; and the debts for which they seek to retain, therefore, do not arise out of any contract prior to the assignation, but out of new transactions with the cedent after the assignation had been intimated.

The consideration which appears to me conclusive is, that as soon as the assignation had been intimated, the bank held thenceforward not for the cedent, and under obligation to convey to her, but for the assignees, and under obligation to convey to them, If Mrs. McArthur had required them to convey to her, or to any other person than the Union Bank, they could not have done so. I think they were just as little entitled to defeat the assignee's right, for their own benefit, either by buying the estate for a price, or by advancing money and holding it for repayment. It appears to me to be contrary to settled principles of law, as well as of equity, to allow the creditor in an assignable obligation, after transferring it for value to a purchaser, to diminish his assignee's right by transactions with the debtor without notice to the assignee; and I think it equally impossible for the debtor to take benefit from such transactions, if the assignation has been intimated to him.

I am therefore of opinion that the first question should be answered in the negative, and the second in the affirmative.

On appeal,

1886. Nov. 17, 22, 23. *Macnaghten*, Q.C., and Sir *H. Davey*, Q.C. (with them *A. Low*), were for the appellants.

Balfour, Q.C., and *A. Graham-Murray* were heard for the respondents.

The material argument of counsel is fully given in the minutes of debate, and the opinions of the judges in the Court below.

The only additional material point argued for the respondents was that the disposition to the National Bank was in reality a collateral security by way of absolute disposition for advances to third parties, namely the firm, and the intimation of the assignation alone could not defeat their right to continue to draw advances.

Time having been taken, judgment was delivered as follows:

LORD HALSBURY, L.C.:—

My Lords, two propositions appear to be established beyond dispute in the discussion of the learned judges on this question.

One, that the National Bank held an absolute disposition of the lands in question dated the 12th of February, 1879, and recorded some days later. Another, that the terms of a back-letter, the meaning and construction of which I will refer to presently, qualified the absolute disposition and restricted the title to one in security.

The interesting historical retrospect of the Lord President of the mode in which this form of transaction came to be adopted by Scotch conveyancers in order to avoid the common law, and the statute of 1696 is, I think, very relevant to what is the substantial nature of the transaction in question. It certainly bears a very close analogy to the English mortgage of land, which conveys in the most absolute form the estate to the mortgagee, but which nevertheless is only held as a security for money advanced.

In the language of the back-letter the National Bank were to "hold the said disposition in security and until full and final payment of all sums of money now due or" (and these are the

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cardinal words) "which may hereafter become due." These words, it is contended, are enough in construing the personal contract to establish that by the contractual relations between the parties the National Bank were entitled to prevent Mrs. McArthur borrowing elsewhere than from themselves anything upon the security of the lands in question.

The first observation that strikes one is that no such express contract appears on the face of the instrument. It might be that Mrs. McArthur would continue to borrow to the full extent of the security, and if she did so borrow from the National Bank there is no doubt that the security would (as the language I have quoted obviously intended that it should) form a security for such further advances. But does it follow that because the back-letter makes provision for what in that event would be a natural and proper course of dealing, that thereby Mrs. McArthur entered into a contract not to deal with her reversionary interest with anyone else?

It is certain that no obligation is imposed on the National Bank to advance any more money than they have already advanced, and the result would appear to be that Mrs. McArthur by entering into a contract to allow her property to be security for all sums already due and for all sums, which upon terms to be afterwards settled between them, the bank might advance to her, she thereby undertook that she would remain with that bank as a customer (to use the language of one of the learned judges) until the value of her security were exhausted.

It appears to me that this is the real ground of difference upon which the learned judges have been divided. It is not denied —indeed it is insisted—that upon payment of all sums due Mrs. McArthur would be entitled to demand reconveyance, and it cannot therefore be denied that if, instead of fresh advances obtained from the National Bank, Mrs. McArthur had proceeded to some other bank which was in a position to advance the whole of the sums already due and make to Mrs. McArthur a further advance, such a transaction would have been perfectly competent. But although that would seem to shew that Mrs. McArthur's interest in the unpledged value of the security was such as to enable her to get further money value for it, nevertheless as long

as the National Bank remained the absolute unqualified disponees she could not treat for, or dispose of in any effectual manner her reversionary interest.

It would seem to be a strange result of what the Lord President has pointed out was a pure conveyancing expedient to avoid the operation of the common law and the statute law, that an admittedly valuable property is no longer at Mrs. McArthur's disposition, but that on the personal contract, as distinguished from the feudal relation created by absolute disposition, she was not at liberty to seek for further advances elsewhere than from her original creditor. We are dealing here, not with the rights of third parties, but with the rights of the immediate parties to the transaction, and I gather from the reasoning of some of the learned judges that they think there is an implied term (for it is certainly not expressed) in the contract in question that she is not to seek elsewhere to borrow on the security of what is nevertheless admitted to be her own remaining interest.

My Lords, if I am right as to the true nature of the contract between the parties, each fresh advance must have been the subject of a fresh agreement in this sense, that the bank must have consented to advance it, and upon that consent Mrs. McArthur's previous contract would make such fresh advance a charge upon her interest in the reversionary right. But the question is whether Mrs. McArthur having bargained away and made an assignation of her reversionary right to the knowledge of the National Bank could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. My Lords, it seems to me that such a proceeding is contrary to good faith, and the decision of your Lordships' House in *Hopkinson* v. *Rolt* (1) establishes the principle, and establishes it upon the broadest grounds of natural justice. My Lords, I am not impressed with the completeness of the feudal ownership created by the absolute disposition. No question arises here which diminishes its complete and absolute character. Whether what remains in Mrs. McArthur be regarded in the light of a pactum de retrovendendo, or whatever be the character of her interest,

(1) 9 H. L. C. 514.

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the real question comes back not to the form of the transaction, but to its substance and to what is the actual bargain between the disponer and the disponee as evidenced by the back-letter. Doubtless each of the two parties may be said to have proceeded upon a bonâ fide belief in their respective rights and to have acted in pursuance of them, but how it can be suggested that Mrs. McArthur could in good faith affect to charge with further sums borrowed that which she had already purported to assign I am at a loss to understand, and it is to be observed that the National Bank made the advances for which they now claim priority with the knowledge that Mrs. McArthur had done so.

My Lords, I think the principle upon which *Hopkinson* v. *Rolt* (1) was decided is one which governs this case, that its application is not confined to the law of England, but is applicable to the law of Scotland also, and I should feel myself bound by that case even did I not agree with the principle upon which it was decided. For these reasons I move that the interlocutor be reversed, and that the respondents should pay to the appellants the costs both here and below.

LORD WATSON:—

My Lords, this appeal raises a question of considerable importance to the law of Scotland. In disposing of it your Lordships have the great advantage of having before you the opinions of all the learned judges of the Court of Session, which contain a clear statement of every reason that can be urged for or against the judgment appealed from.

The execution and recording of an absolute disposition of heritage, qualified by a personal contract in the form of an unrecorded back-letter, for the purpose of creating a security for future debts, has the effect of vesting the full feudal estate in the disponee; and the disponer's interest is thereby reduced to a personal right to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the secured debts. As regards third parties who transact with him on the faith of the public records, the powers of the disponee are not affected by the private contract,

(1) 9 H. L. C. 514.

and he can sell or burden the estate, and can give a valid title to the purchaser or incumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But, in a question with the disponer himself, or with persons who through him have acquired an interest in the estate, or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction.

In *Robertson* v. *Duff* (1) it was held in the case of a security constituted by a disposition ex facie absolute, that the terms of the arrangement for securing debt, in pursuance of which the conveyance was made, might, as between the disponer and disponee, be instructed by the same kind of evidence which would be competent and sufficient to prove a trust, in a question with an absolute disponee. Lord Fullerton, and the other judges who took part in the decision, spoke of the case as one of trust; but the fact that they so described it does not affect the grounds of their judgment. I agree with the Lord President in thinking that the transaction with which we have to deal is not within the category of proper trusts, as that term is understood in the law of Scotland; but I do not think that it is in form or in substance a pactum de retrovendendo. The conveyance does not bear to be granted in implement of a contract of sale, and it was never contemplated by the parties that the National Bank should stand as purchasers, with an obligation to resell; what they did contemplate was that the bank should hold the subjects as a security for debt, with power of sale, and under an obligation either to reconvey (before sale) on receiving payment of the debt, or to account for the price under deduction of the debt. The effect of the unrecorded back-letter is to make the right of the respondents a mere security as between them, on the one hand, and Mrs. McArthur and all deriving right from her on the other. If the letter had been recorded in the register of sasines, their right would have become a mere security in a question with the public, who would no longer have been entitled to deal with

(1) 2 Court Sess. Cas. 2nd Series, p. 279.

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the respondents on the footing that they were the absolute proprietors of the estate.

In some of the judgments in the Court below there is a great deal of learned discussion as to the nature of the disponer's right under an unrecorded back-letter, but I do not think there is any real difference of opinion upon that point. In form it is a personal right, consisting in obligatione, and it has been frequently described with perfect accuracy as a jus actionis. The right of a beneficiary under a trust constituted by an ex facie absolute disposition, the disponee acknowledging by a separate writing, which does not enter the records, the trust purposes for which he holds, is a right of precisely the same quality. It is not, strictly speaking, a "radical right," that being an expression which, in the language of the feudal law, is used to denote the right of a proprietor who, without divesting himself of his feudal estate, creates an incumbrance upon it, viz.: by means of a trust conveyance bearing to be granted for payment of debt. But I am of opinion that the relations of the parties to this case do not depend upon feudal principles, and consequently that Lord Rutherford Clark was justified in saying that "the radical right to the subjects which had been conveyed to them (i.e. to the respondents) remained in Mrs. McArthur." Apart from considerations of feudal law, Mrs. McArthur had the radical right in this sense, that, according to the reality of the transaction, she was the only person who had a proprietary interest in the subjects of the security, and that each successive advance, whilst it enlarged the bank's right of retention, imposed an additional burden upon her proprietary interest.

It appears to me that the key to the difference of opinion in the Court below is to be found in the widely different constructions which were put by the majority, and minority of the learned judges respectively, upon Mrs. McArthur's letter of the 12th of February, 1879, which contains the terms upon which the respondents agreed to hold the disposition in their favour. In the opinion of the majority that letter gives the bank not only power to retain the property until they are relieved of advances made by them, whilst Mrs. McArthur continues to be owner of the reversionary interest, but an absolute right to retain it for advances

made to her or her firm, after she has, with the full knowledge of the bank, transferred her whole rights as reversioner to an onerous assignee, having no interest in those advances, and being under no obligation to secure them. At your Lordships' Bar Counsel for the respondents not only admitted but maintained that, as a necessary consequence of that construction, the bank had the right to lend to Mrs. McArthur, on the security of the property, and to the full extent of its value, although she had sold the reversion as it stood, and had expressly undertaken not to borrow, and the sale and the terms of that undertaking had been intimated to the bank before any advance was made. According to the view taken by the minority, the only debts falling within the arrangement embodied in the letter are advances made by the bank upon the credit of Mrs. McArthur, and affecting her beneficial interest in the estate which was feudally vested in them; and therefore the bank had no right to make advances affecting that beneficial interest, after they became aware that she had been divested of her interest by an assignation to the appellants.

I cannot say that I have had any difficulty in preferring the construction of the personal contract between Mrs. McArthur and the respondents, which was adopted by the minority of the judges; and seeing that I have been influenced by the very same reasons which have already been fully stated by their Lordships, I shall not repeat them. It is a necessary consequence of that construction that the preferable claim of the respondents upon the subjects vested in them must, in a question with the appellants, be limited to the debt due to them from Mrs. McArthur and her firm, at the time when the appellants' assignation was intimated, the appellants having priority for advances made after that date. Upon the terms of the back-letter, I should have come to that conclusion quite independently of the decision of this House in *Hopkinson* v. *Rolt* (1). The principle of that decision, of which I entirely approve, does not rest upon any rule or practice of English conveyancing, but upon principles of natural justice. The circumstances of the two cases are in many respects very analogous; but it is in my opinion quite sufficient, for the decision of this case, that the terms of their personal contract

(1) 9 H. L. C. 514.

H. L. (Sc.) 1886 UNION BANK OF SCOTLAND v. NATIONAL BANK OF SCOTLAND. Lord Watson.

with Mrs. McArthur precluded the respondents from making advances to her upon the security of property which was known by them to belong in reality not to her, but to the appellants, as her onerous assignees.

Notwithstanding the importance of the present case, I have confined myself to these somewhat desultory observations, because I entirely concur in, and can add nothing to, the reasoning of the five learned judges, who constituted the minority in the Court below.

I am of opinion that the interlocutor appealed from ought to be reversed, with costs, and that your Lordships ought to answer the second question in the special case in the affirmative.

LORD BLACKBURN :—

My Lords, I have read with attention the different judgments delivered in this case below.

I have also had the advantage of reading in print the opinion of my noble and learned friend, Lord Watson.

I do not think any benefit would be gained by my saying more than that I agree with the judgment proposed.

Interlocutor appealed from reversed. Respondents to pay to appellants the costs both in this House and in the Court below.

Lords' Journals, 10th December, 1886.

Agents for the appellants : *Murray, Hutchins, & Co.*, for *J. & F. Anderson, W. S., Edinburgh.*

Agent for respondents : *Andrew Beveridge*, for *Dove & Lockhart, S. S. C., Edinburgh.*

[PRIVY COUNCIL.]

MARY ELIZABETH ALLEN AND HER HUSBAND . . . . . } PLAINTIFFS;

AND

THE QUEBEC WAREHOUSE COMPANY DEFENDANT.

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Nov. 17, 18.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.

Practice—Concurrent Findings of Facts.

Where there have been concurrent findings of fact by the Courts below, the question in appeal is not what conclusion their Lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong.

Naragunty Lutchmeedavamah v. *Vengama Naidoo* (9 Moore's Ind. Ap. Ca. 87), and *Tareenychurn Bonnerjee* v. *Maitland* (11 Moore's Ind. Ap. Ca. 338) followed.

APPEAL from a decree of the Court of Queen's Bench for Quebec (Oct. 8, 1884), affirming a decree of the Superior Court of the province of Quebec, district of Quebec (Sept. 12, 1883). The facts are stated in the judgment of their Lordships.

Sir *W. Phillimore*, Q.C., and *Barnes*, for the appellants, contended that the evidence proved the rotten and defective condition of the post and wharf, which the appellants had no reason to suspect, and of which they had no notice. That condition was the sole cause of the accident. The evidence negatived the respondents' contention that the vessel was not sufficiently moored to the wharf, and that she should have been made fast to more than one post. There was breach of contract by the respondents and breach of their implied warranty that the mooring-post and wharf were fit for the vessel to be moored to. There was in law a warranty of the post similar to a warranty of seaworthiness, that it was reasonably fit for the purpose for which it was wanted. As for the law of warranty in Lower Canada, see Civil Code of

* *Present:*—LORD FITZGERALD, LORD HERSCHELL and SIR BARNES PEACOCK.

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L. C., chap. 2, tit. 7, ss. 1, 2, and 3, especially arts. 1605, 1612, 1613, and 1614. [SIR BARNES PEACOCK referred to art. 1601.] *Francis* v. *Cockrell* (1); *Hyman* v. *Nye* (2); *Readhead* v. *Midland Railway Company* (3); *The William Lindsay* (4).

Mylburgh, Q.C., and *Jeune*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD HERSCHELL:—

This is an appeal by Mary Elizabeth Allen and John Henry Allen, her husband, plaintiffs in an action brought by them against the Quebec Warehouse Company, to recover damages for an injury sustained by a ship belonging to the female plaintiff in the month of November, 1880. The action was brought in the Superior Court of the province of Quebec, and the judge of first instance dismissed the action. The plaintiffs then appealed to the Court of Queen's Bench of the province and that Court affirmed the judgment of the Court of first instance. The present respondents, who were the defendants in that action, themselves brought an action against the present appellants to recover damages for the injury which their quay and appliances had sustained owing to the same disaster, which action was likewise dismissed in both Courts. There is no appeal so far as regards the decision in that action, and their Lordships have only to deal with the first action, viz., the action of Mrs. Allen and her husband against the Quebec Warehouse Company.

It appears that about the 3rd of November, 1880, Mrs. Allen entered into a contract with the respondents for a mooring berth for a vessel called the *Bridgewater* at the respondents' wharf and booms; and that contract being entered into, the *Bridgewater* was placed in position and moored, and remained so moored until the 21st day of that month, when, during stormy weather (the nature of which will be referred to hereafter), the vessel broke adrift, the post or a portion of the post to which the vessel was

(1) Law Rep. 5 Q. B. 501.
(2) 6 Q. B. D. 685.
(3) Law Rep. 4 Q. B. 379.
(4) Law Rep. 5 P. C. 338.

moored was drawn out from the quay, and, owing to this, the vessel sustained very considerable injury. An action was brought to make the defendants liable for that injury, the foundation of the action being that the disaster arose from the fact that the post was rotten and not fit for the purpose for which it had been used and was intended to be used. Both the Courts below have taken a view unfavourable to the appellants upon the facts, and no question of law appears to their Lordships really to be in dispute, or to have been dealt with in any way erroneously by the learned judges in the Courts below. It does not appear to their Lordships to be necessary to consider whether the contract which was made in the present case was a lease or hiring within the terms of the Civil Code of Lower Canada to which their attention has been called, nor to say whether, strictly speaking, there was a warranty such as has been contended for, because their Lordships think there can be no doubt what the character of the contract made between the parties substantially was. Whether it be called a warranty or not, there can be no doubt that inasmuch as the respondents gave the appellants for valuable consideration the use of their mooring appliances to moor the appellants' vessel, it was an essential part of that contract that the mooring appliances, taking them altogether, were fit and proper for ordinary use by prudent persons, and were not in such a condition that if properly used the vessel which moored to them would suffer from reliance being placed upon them. On the other hand the company who gave to the appellants the use of these mooring appliances had equally a right to expect that the mooring appliances as a whole would be used in the manner in which a prudent and reasonably skilful person would use such appliances; and their Lordships can see no reason to think that any erroneous view in regard to the true relation of the parties was taken by either of the Courts below. No doubt the obligation may be expressed in different ways, and it may be to some extent a question of words, whether it is spoken of as an essential part of the contract, or as a warranty, or in any other particular way; but looking at the substance of the matter, their Lordships see no reason to suppose that the Courts below have dealt with it erroneously.

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The case put by the appellants in their factum is thus stated: "It is obvious, from the nature of respondents' business, that under their contract with the first appellant they warranted that their wharf, booms, and block, and the mooring-posts upon them were in good order and condition, and sufficient for the purposes for which they were intended. Their obligation went undoubtedly to this extent, and for any failure in this respect on their part occasioning loss, they would be liable, assuming that there was no contributory negligence by the other party. On the other hand it was incumbent upon the people of the ship to moor her skilfully and properly, in reliance, however, upon the soundness of the gear provided by the wharfinger." That is the statement of their view of the law by the appellants, and that view seems to have been the one dealt with by the Courts below in considering the facts of the case.

Their Lordships having arrived at the conclusion that there has been no error in point of law, the sole question that remains for determination is whether the judgment of the Court below ought to be reversed on the ground that the judges have taken an erroneous view of the facts. Now, it has always been the view taken by this Committee in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the judges who have been unanimous below should be supported or reversed, that unless it be shewn with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed. That principle has been laid down in many cases. On this point the observations of Lord Kingsdown, in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1), may be quoted. "It is not," he says, "the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India" (and the principle is equally applicable to other Courts) "merely on the effect of evidence or the credit due to witnesses. The judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion it must be shewn very

(1) 9 Moore's Ind. Ap. Ca. 87.

clearly that they were in error in order to induce us to alter their judgment." And Lord Cairns uses these words in delivering the opinion of their Lordships in a subsequent case, *Tareeny Churn Bonnerjee* v. *Maitland* (1): "Now, the learned judges in the Courts below, the two judges in the primary Court, and the three judges in the Court of Appeal, have all arrived, without hesitation, at the conclusion that the debt of 43,674 rupees was not a bonâ fide debt due from Obhoy Churn, and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five judges unless the very clearest proof were adduced to their Lordships that that decision was erroneous. It is true that only the two primary judges had before them the witnesses or the witness who were or was examined, but the three judges of the Court of Appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two judges of the Court below had arrived at a just conclusion upon the evidence that was adduced." Their Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong. Now, taking the obligation to be that to which attention has already been called, the question raised by the case is, whether the learned judges were wrong in holding that the appellants' claim was not well founded, inasmuch as the disaster which occurred was not solely due to the imperfections of the post which was said to be imperfect, but was due, in part at all events, to other causes for which the appellants were themselves to blame. No doubt with regard to the condition of the post there was a great deal of evidence tending to shew that it was more or less unsound; and there was evidence of weight tending to shew that the unsoundness was considerable, though that evidence was certainly not of the definite character which their Lordships would have desired. It is to be observed that the Court below had the opportunity

(1) 11 Moore's Ind. Ap. Ca. 338.

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(whether it was exercised or not their Lordships are not aware) of looking at the piece of the post itself, so as to be able by their own eyes to test to some extent the evidence given by the witnesses, which was of a very contradictory character. That is an advantage which they had which their Lordships on the present occasion do not possess. But taking it to be established that the post was more or less infirm, that does not dispose, as the appellants have contended it does, of the whole case. If it rested upon that alone, no doubt a very strong case was established on the part of the appellants; but the question then arises whether in the circumstances which existed prior to the disaster the appellants were entitled to trust solely to the particular post to which their vessel was attached, and to say that the vessel was properly moored, and that they were using the appliances, of which they had obtained the use, in a proper manner, by mooring the bow of the ship to that post and to that post alone. Upon this point again there was contradictory testimony. There was some evidence that, being moored as they were to the one post alone, they were properly moored, but there was evidence of a weighty character to the contrary; and what their Lordships would desire specially to point to is this, that the question is not whether it was proper at any time or under any circumstances to moor to the one post alone. It may well be that under certain circumstances and at certain times the post was sufficient for the purpose, and indeed it proved itself to be so, for it held this very ship in position for many days. But then arose circumstances of a different character, viz., a gale, called by the master a violent gale, by the mate a strong gale, or a fresh gale,—it matters not what designation be given to it—and undoubtedly with the gale there was also in the same direction a strong tide, both forcing the ship the same way. Under these circumstances was it a prudent and proper use of the appliances put at the appellants' service under the contract to continue moored to one post only? There is strong evidence that it was not. The evidence on the point is contradictory, but their Lordships are not prepared to say that the Courts below were wrong in holding that the true conclusion was that, under the circumstances which existed shortly before the disaster, those who had the use of the mooring

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appliances were not using them in a reasonably skilful and prudent manner. If that conclusion be the right one, and if it has not been shewn (and their Lordships think it has not been shewn) that if the mooring appliances had been used in a proper and skilful manner, the accident would nevertheless have happened by reason of the rottenness of the post, their Lordships' view is that the judgments of the Courts below cannot be disturbed, and their Lordships will therefore advise Her Majesty that the judgment appealed from be affirmed and the appeal dismissed with costs.

Solicitors for appellants: *Gregory, Rowcliffes, Rawle, & Johnstone.*

Solicitors for respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

J. C.* 1886 *Nov.* 20.

WILLEM HIDDINGH . . . . . APPELLANT;

AND

ABRAHAM DENYSSEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Practice—Consolidation of Appeals.

Their Lordships will consolidate appeals at any stage if it appears convenient that they should be heard together. An appeal was struck out of the board and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted.

THIS was a motion for the consolidation of three appeals under the following circumstances:—

On the 16th of November, 1883, the appellant and three others, heirs under the will of Petrus Hofstede Hiddingh, deceased, sued the respondent, in the capacity of secretary to the South African Association for the administration and settlement of estates, and

* *Present:*—LORD HOBHOUSE, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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two others, the executors testamentary jointly with the respondent of the estate of the deceased, for damages alleged to have been sustained by the heirs by reason of the negligence, delay, and breach of duty on the part of the executors in liquidating the estate and disposing of certain shares forming part of the estate. They also claimed the amendment of a certain liquidation account by the striking out of certain items charged for advertising the sale of and calling for tenders for the said shares.

The action came on for trial before the Supreme Court on the 14th of January, 1884, and judgment was given for the defendants.

On the 28th of April, 1884, an appeal was admitted by the Supreme Court to Her Majesty in Council. This was the first of the three appeals which it was now sought to consolidate.

On the 5th of May, 1885, the appellant alone commenced a second action against the respondent in his said capacity and as the administering executor of the estate of the deceased, and the administrator of certain trust funds belonging to the appellant and the agent of the said appellant, and against his co-executors, claiming in substance: (1) That the interest on the entailed portion (three-fourths) of the appellant's share of the testator's estate between the date of his death and the date of the credits to the appellant's entailed estate should be paid to the appellant, and not added to the capital of such entailed estate.

(2.) That the association be ordered to expunge from their accounts any charge for commission beyond the sum of £500 bequeathed by the testator.

(3.) That the securities from time to time representing the entailed estate be kept separate and distinct from the proper moneys of the association, and that the appellant be credited with and be paid the actual interest received by the association upon the entailed capital administered by the association.

(4.) Damages against the executors for negligence in and about the sale of certain shares forming part of the said testator's estate.

A plea of res judicata by reason of the judgment in the first action was set up by way of exception to the allegations of negligence on the part of the respondent and his co-executors, and

was sustained by the Court. Upon the other points raised by the appellant the judgment of the Court, which was delivered on the 13th of July, 1885, was partly in favour of the appellant and partly in favour of the respondent. On the 21st of July, 1885, both the appellant and the respondent obtained leave to appeal to Her Majesty in Council from such parts of the said judgment as were adverse to them respectively. The appellant now presented his petition to consolidate these two cross-appeals from the judgment of the 13th of July, 1885, with the appeal from the judgment of the 14th of January, 1884. The last-mentioned appeal stood in the list for hearing within five of the appeal then being heard by the Judicial Committee. The printed case had not yet been lodged in the two cross-appeals, to the consolidation of which no objection was made.

Haldane, for the appellant, contended that all the appeals arose out of the same will, that the decision in the first action had been pleaded as res judicata in the second, and that the consolidation would cause a great saving of expense.

Mackarness, for the respondent, contended that there had been two distinct causes and judgments in the Court below, separated by an interval of a year and a half, and that there ought to be no consolidation without the consent of the respondent. The subject-matter of the second appeal was in the main of a different character from that of the first. The saving of expense by consolidation would be trifling, and the appellant's delay in regard to the first appeal disentitled him to consideration on that point. He referred to Macpherson's Practice of the Privy Council, 2nd ed., pp. 92, 93, and *Moofti Mohummud Ubdoollah and Another* v. *Baboo Mootechund* (1).

THEIR LORDSHIPS were of opinion that both appeals dealt with practically the same subject-matter, and that there would be a saving of expense if they were heard together, and made an order to that effect.

Solicitors for appellant: *Burchell & Co.*

Solicitors for respondent: *Venning, Sons & Mannings.*

(1) 1 Moore's Ind. Ap. Ca. 363.

[PRIVY COUNCIL.]

J. C.* 1886 *Nov.* 19, 24, 25; *Dec.* 11.

PRICE . . . . . PLAINTIFF;

AND

NEAULT . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Canada—Quasi Contract—Civil Code, art. 1041—*Commencement de Preuve.*

Where a landowner has empowered his agent to aliene, and such agent has without a completed contract to sell allowed an intending purchaser to take possession of a plot, effect substantial improvements in the reasonable expectation of obtaining a transfer on paying a proper price, and then transfer to the defendant, who in turn effected improvements:—

Held, that such landowner has thereby laid himself under an obligation, such as in Civil Code, art. 1041, is called a quasi contract, to confirm the defendant's possession and title upon payment of the price thereof according to the rate ruling at the time of commencing the improvements with interest from that date.

Commencement de preuve must be some written evidence which lends probability to that which is sought to be proved by oral evidence.

APPEAL from a decree of the Court of Queen's Bench (Oct. 8, 1884), reversing a decree of the Superior Court (Nov. 2, 1883).

The facts are stated in the judgment of their Lordships.

The first Court held in favour of the appellant, and ordered him to be put into possession of the land in suit, reserving to the respondent recourse for his improvements on the land.

The Court of Queen's Bench (Dorian, C.J., Monk, Cross, and Raby, JJ., Cross, J., dissenting), held that the appellant was not entitled to the land, but only to compel the respondent to pass title to it and pay the price for it. The Court held also that the sum paid into Court was not sufficient, as it should have included interest during the time possession had been held by the respondent and his predecessors in title.

* *Present*:—LORD BRAMWELL, LORD HOBHOUSE, LORD HERSCHELL, SIR BARNE PEACOCK, and SIR RICHARD COUCH.

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Bompas, Q.C., and *Jeune*, for the appellant, contended that the respondent could not succeed without a contract in writing, or, at all events, without producing a written commencement de preuve, which he had failed to do. There was no sufficient evidence from which a quasi contract could be presumed or held to be established within the meaning of Civil Code, art. 1041. There was no sufficient evidence according to French law to establish the respondent's case. Beaudry, moreover, had no authority to sell, nor could a sale be implied from his acts. Reference was made to Civil Code, 1605, 1608; Pothier, Obligations, sect. 113; Ancien Denizart, vo. Commencement de preuve, sect. 2; Nouveau Denizart, vo. Commencement de preuve: *Lacroix* v. *Lambert* (1); *Lawrence* v. *Stuart* (2); *Macdonald* v. *Lambe* (3).

The respondent did not appear.

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Dec. 11.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the plaintiff, who is also the appellant, seeks to recover a plot of land in the possession of the defendant, and the question is whether the transactions which passed between the plaintiff and his agents on the one hand, and the defendant and his predecessors in title on the other, are such as to preclude the plaintiff from recovering the land. The defendant, now respondent, has not appeared on the appeal, so that their Lordships are under the disadvantage of deciding the case on an ex parte hearing.

The land in question is a small portion of a tract of wild woodland purchased by the plaintiff in the year 1865, and then lotted out by him for settlement. The plaintiff himself appears to have taken little or no personal part in the management. He employed as local agent one Mr. Beaudry, and as superior agent his brother David Price, who resided at a distance, apparently in Quebec.

Beaudry kept a book in which he entered the names of persons who desired to acquire plots of land. It appears that settlers entered freely upon vacant plots, and effected improvements upon them, without any title except the entry of their names in the

(1) 12 Low. Can. Rep. 229. (2) 6 Low. Can. Rep. 294.
(3) Law Rep. 1 P. C. 539.

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book; and perhaps that formality was not always observed. When one of them became desirous of perfecting his title, or was warned by Beaudry that he must either pay for the land or give it up, he would repair to Beaudry's office and take up a formal contract on payment of the price or of some instalment of it. The contracts were prepared by Beaudry, and signed by the plaintiff or by David Price. Beaudry states that David Price sometimes refused to sign the deeds forwarded to him, but he does not shew under what circumstances.

In November, 1865, Beaudry received instructions from David Price, which are not quite clear, owing to that gentleman's very imperfect mastery of the French language in which he wrote. They related to the order in which the plots should be sold, to the purchase-money for them, and to the wood upon them; and he states that certain persons had applied to him for plots, and that he had referred them to Beaudry as his agent.

Prior to 1872 one Ludger Neault applied for the plot now in question, which is distinguished as No. 34 of Range B North, and his name was entered for it in Beaudry's book, but he did not work upon it. In 1872 he made over his interest (gratuitously it seems) to Marcelin Perron, who wished at once to improve the land. Perron's evidence is to this effect: he did not go to Beaudry's offices to give in his name; he only asked him for permission to work and to build a flour mill on the plot. He told Beaudry that he had purchased the plot from Ludger Neault on the same conditions on which Neault held it, and asked if he might work on it and build a flour mill; Beaudry said Yes, telling him to work. Upon this Perron entered, cleared a small quantity of land, and built his mill. In November, 1873, he sold his interest to the defendant for 900 dollars. The defendant has been in possession ever since, and has effected larger improvements in the shape of clearances, buildings, and roads. He has also paid the local taxes and contributions, and the municipal officers say that he paid them as proprietor. But he has never got a written contract, nor has he paid any purchase-money.

In December, 1882, the plaintiff gave the defendant notice to quit, and immediately afterwards brought the present action, in which he claims possession of the land with $400 damages.

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After action brought the defendant tendered $150 as the purchase-money, and paid that sum into Court, alleging that the plaintiff or his agents had fixed the purchase-money at that amount in the preceding October.

The Superior Court gave the plaintiff a decree for possession with costs, saving to the defendant the right to recover the value of his improvements. The defendant appealed, when the Court of Queen's Bench reversed the decree, and dismissed the action with costs, reserving to the parties all rights which either could enforce against the other in respect of the said immovable property. That is the decree now appealed from.

The ground laid by the Court for their decree is that the defendant and Perron were put into possession of the land, had possessed it for more than ten years, and had made substantial improvements within the sight and knowledge and with the consent of the plaintiff by means of his agents, and on a promise that he would consent to a deed of sale for the price of $150.

Their Lordships cannot find their way to the whole of the conclusion thus expressed. The transactions between Beaudry on the one hand and Ludger Neault and his successors on the other, rest entirely on Perron's evidence. It has been shewn under what circumstances Perron entered and made improvements. Translating his language freely, he proceeds thus: "I did not ask to buy the plot of Beaudry. I only asked him if I might work and build a flour-mill. I had bought the plot of Neault. I was bound to observe the conditions under which the plot had been sold to him, that is to say, Beaudry had to notify to Neault to come in and take up his contract. I never asked Neault what price he was to pay to the plaintiff for the land. I did not exactly know the price at which the plaintiff was then selling those lands. I did not know that there was a price fixed for all the lots of land of the said range B. north. I do not think that the price was the same for each of the lots. I expected to pay for the ground the price which the plaintiff was selling his lands in that range. I thought that price was $1 per arpent. I never heard tell of it. I did not know it."

On that evidence it is difficult to say that there was any promise or contract as regards the purchase-money. The book

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kept by Beaudry has not been produced, nor does he give any such description of it as would justify their Lordships in inferring a contract to sell from the entry of a name. And there is even greater difficulty in fixing $150 as the price. The reason assigned for doing so is that on the 6th of October, 1882, Mr. Ray, who had then succeeded David Price as chief agent, wrote a letter to Beaudry to the effect that he might sell for $150. But that instruction was revoked on the 3rd of November, and during those four weeks the defendant did nothing by way of completing any contract, nor was his position altered in any way by the discretion so given to Beaudry. It would seem from David Price's instructions in November, 1865, that the prices for lots in general were to be either 5*s.* per arpent for the whole of the lots, or a higher sum (apparently 7*s.* 6*d.*) per arpent with a deduction of 50 per cent. for uncultivable land. On the 3rd of November, 1882, Ray forbade any sales except at $1½ per arpent. And in a letter from David Price to Beaudry, to which the date of the 21st of September, 1872, is assigned, $1½ dollar is assigned as the price of the lots in range B, and some special directions are given with respect to a site for a mill, which are so expressed as to be almost unintelligible. The extent of the plot in question is about 187 arpents.

Moreover, their Lordships feel great difficulty in finding a commencement de preuve for a complete contract. They conceive that a commencement de preuve must be some written evidence which lends probability to that which is sought to be proved by oral evidence. The Court of Queen's Bench find this commencement in David Price's letter of November, 1865, and in Ray's letter of October, 1882. But there is no oral evidence of anything to which Ray's letter lends probability, for, as above observed, nothing was done upon it by the defendant till after the permission given by it had been annulled. And it is hard to see how David Price's letter, which on the most favourable construction of its obscure expressions amounts to a general permission to Beaudry to sell lots in Range B and to deal with some place suitable for a mill, can lend probability to a particular contract in favour of a particular person.

But it does not follow that because there was no completed

contract, the plaintiff can recover the land. Their Lordships hold it to be clearly proved that Perron originally dealt with Beaudry on the position which Ludger Neault had gained by the entry of his name in Beaudry's book; that proceeding on this footing, and after assurances from Beaudry that he would be safe, Perron effected substantial improvements; that he did so with the expectation that he could claim to have the land transferred to him upon paying the proper price; that, considering the condition of the property, the course of business pursued in getting it inhabited, and the assurances of Beaudry, such expectation was one which any reasonable man would entertain; that the defendant succeeded to all Perron's rights; and that he in his turn has effected large improvements. If Beaudry had been the owner, his proceeding to recover the land after Perron and the defendant had bestowed money and labour on it, would have been a glaring injustice; and their Lordships hold that by his conduct Beaudry laid himself under an obligation, such as in art. 1041 of the Civil Code is called a quasi contract, not to disturb Perron in his possession, and to transfer the land to him or his successors in title on payment of the purchase-money. It may be observed that in the case of one Ayotte, Beaudry himself said in the year 1876, that, though he had no signed contract, he could not be deprived of the plots of which he had taken possession, and for which he had made some payments.

The question then arises whether the plaintiff is bound by Beaudry's acts, and it has been argued at the bar with great earnestness that Beaudry had only an authority which was confined to management, which did not extend to alienation, and that as he could not alienate directly, he could not do so indirectly by creating obligations in favour of other persons. But on a careful examination of the evidence, their Lordships think that Beaudry was empowered to bind his principal by a contract of alienation. In the letter of November, 1865, Beaudry is directed by David Price to inform the local public of the terms of sales, and Mongraine's letter of May, 1870, shews that this was done by notice at the church door. In the same letter David Price tells Beaudry that certain persons have applied to him for plots, and that he has referred them to Beaudry as his agent.

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The letter of Mongraine is an appeal to David Price to give him one of the plots on which he had entered and worked, in preference to a rival claimant, and David Price gives no answer except that Beaudry will do what is just. In his letter of the 5th of September, 1870, David Price instructs Beaudry to insert certain conditions "in all the sales that you effect." In his letter of the 21st of September, 1872, David Price tells Beaudry not to sell land in Range B without taking a specified sum at once, and gives him discretion to make other arrangements, it is not easy to say what, while the lots are unsold. Magnan, the municipal secretary and treasurer, who himself settled on a plot, improved it, and afterwards purchased it, being asked how the plaintiff proceeded to sell his plots, says that it was through his agent Beaudry. This gentleman's evidence is of much weight as regards the course of business on the estate, because few of the neighbours could write, and he was chosen to write to Beaudry on their behalf. The postscript to Beaudry's letter of the 4th of August, 1876, is an illustration of what passed between them, and both Magnan and Beaudry say that communications in the same sense frequently took place. In view of these letters from David Price and Beaudry's action upon them, which must have been known to his employers, their Lordships have no hesitation in holding that Beaudry had authority to contract for alienation, though it is true that of the powers of attorney executed by the plaintiff, that which was given to David Price in January, 1866, expressly mentions sales, and that given to Beaudry in September, 1872, speaks only of general regulation and management. Even if in a question between the plaintiff and Beaudry, and on a complaint by the former that the latter had exceeded his powers, it should appear that those powers were more limited than appears in this case, it is quite certain that the plaintiff authorized Beaudry so to act as to lead the public reasonably to conclude that he had power to bind his principals by contracts of alienation, and that both he and intending purchasers dealt in good faith on that footing. In such a case the plaintiff would fall within the principle expressed in art. 1730 of the Civil Code, which is a plain principle of justice, and, so far as their Lordships know, is common to all systems of law.

From the foregoing examination of the case it results that whatever obligation would fasten upon Beaudry if he were owner of the land in question, is fastened on the plaintiff, and that he is bound, upon payment of the proper price, not to disturb but to confirm the defendant's title. That is a complete answer to the action for possession, and the decree appealed from ought therefore to be affirmed, but with a variation in the ground assigned for it. Their Lordships have felt some doubt what that variation should be. It would probably be more beneficial to the parties if they could fix the exact price to be given for the land in dispute. They do not doubt that it was to be the ruling price at which the other plots in Range B North were selling at the time when Perron began to make his improvements. And if they saw that the parties had directed evidence to this question, and had produced nothing but what is now in the record, they would come to the conclusion that the price was $1·50, or 7*s.* 6*d.* per arpent. But though there must be ample evidence on the point, it was not directly in issue, and the witnesses have not been called to speak directly to it. Under the circumstances, their Lordships think it will be best to declare that the respondent, by the acts of himself and his agent Pierre George Beaudry, has brought himself and still is under an obligation towards the appellant to confirm his possession and title of and to the plot of land in dispute, upon being paid the price thereof according to the rate at which the respondent was selling the other plots in Range B North at the time when Marcellin Perron began to make improvements thereon, with interest from the same time, and that on this ground the appeal should be dismissed, and the decree of the Court of Queen's Bench affirmed.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion. As the respondent has not appeared there will be no order as to costs.

Solicitors for appellant: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

J. C.*
1866
Nov. 23;
Dec. 11.

THE OWNERS OF THE "THOMAS ALLEN". . . . . } DEFENDANTS;

AND

GOW AND OTHERS. . . . . PLAINTIFFS.

THE "THOMAS ALLEN."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF HALIFAX, NOVA SCOTIA.

Salvage—Quantum to Salvors—Reduction.

Case in which salvage remuneration was reduced from $12,000 to $7500; their Lordships being of opinion that the difference between the sum awarded and that which would be liberal was so large as to require correction.

The Glenduror (Law Rep. 3 P. C. 589) approved and followed.

APPEAL from a decree of the Vice-Admiralty Court (Oct. 10, 1885), made in an action in rem brought by the respondents against the ship *Thomas Allen*, her cargo and freight.

The facts of the case are set forth in the judgment of their Lordships.

Sir *W. Phillimore*, Q.C., and *Aspinall*, for the appellants, contended that the amount awarded was excessive, and under the circumstances out of all proportion to the services rendered. They referred to *The Glenduror* (1); *The Cheta* (2); *The Amérique* (3); *The De Bay* (4); *The Hudson*, decided by Butt, J., May 19, 1885 (5); *The Fairy Vision*, decided by Dr. Lushington in 1867 (6); *The Inchrona* (7); *The A. N. Hansen*, decided Dec. 3, 1885 (8). There were only two days' work here, and not a rope broken.

* *Present*:—LORD HERSCHELL, SIR BARNES PEACOCK, and SIR JAMES HANNEN.

(1) Law Rep. 3 P. C. 589.
(2) Law Rep. 2 P. C. 211.
(3) Law Rep. 6 P. C. 468.
(4) 8 App. Cas. 559.
(5) Unreported; vide Mitchell's Maritime Register.
(6) Mitchell's Maritime Register, p. 64.
(7) Shipping and Mercantile Gazette, 1885.
(8) Unreported.

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1886
OWNERS OF THE "THOMAS ALLEN" v. GOW.
THE "THOMAS ALLEN."

Myburgh, Q.C., and *Hollams*, for the respondents, contended that the award was not excessive, and was in accordance with the law and practice of Admiralty Courts in salvage cases. No erroneous principle was acted upon. Each case must be decided in reference to its own circumstances, and the discretion of the Court below will not be interfered with unless exercised with manifest unfairness. They referred to *The Lancaster* (1); *The Neptune* (2). [THEIR LORDSHIPS referred to *The Cuba* (3).]

Sir *W. Phillimore*, Q.C., replied.

1866
Dec. 11.

The judgment of their Lordships was delivered by

SIR JAMES HANNEN:—

This is an appeal from a decision of the judge of the Vice-Admiralty Court, at Halifax, Nova Scotia, in an action for salvage, on the ground that the sum awarded by the learned judge is excessive.

The material facts are as follows:—

On Saturday, the 3rd of October, 1885, the screw steamship *Thomas Allen*, on a voyage from New York, when about 300 miles from Halifax, broke her shaft.

She was then in the Gulf Stream, with a north-easterly current of one and a half to two miles, the wind being south-east.

At 6 P.M. she was seen by the *Austerlitz*, a steamer of 1600 tons, on a voyage from Philadelphia to Bordeaux, and at 6.30 the *Austerlitz* reached her, when an agreement was come to that the *Austerlitz* should tow the *Thomas Allen* to Halifax. At about 8.30 the operation of making fast was completed, and the two vessels proceeded on their course. The place where the *Thomas Allen* was picked up was 40° N. and 66° W., at a distance of over one hundred miles in a south-easterly direction from George's Shoal, and within the current of the Gulf Stream setting her north-east.

The boat work required in connecting the two vessels was performed by the *Thomas Allen*, and the operation of making fast was accomplished without difficulty or danger. The two vessels anchored in Halifax harbour at 3.30 P.M. on Monday the 5th of

(1) 9 P. D. 14. (2) 12 Moo. P. C. 346. (3) 1 Lush. 14.

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October. Thus the actual towing occupied forty-three hours, and the whole time that the *Austerlitz* was engaged in assisting the *Thomas Allen* was forty-five hours, to which must be added the time required to regain the position she had lost while giving this assistance. The wind was favourable for a portion of the time, and both vessels were able to carry sail.

The towing was performed without any stoppage at an average rate of seven miles an hour, and without any unusual consumption of coal.

No accident of any kind happened beyond the loss of a running line, and chafing on the poop deck of the *Austerlitz*, which would cost two or three dollars to repair.

It was argued for the *Austerlitz* that it was to be assumed that she had not, by her charter, liberty to tow. But in the absence of any evidence on the point no such assumption can be made.

The agreed values were, of the *Austerlitz*, her cargo and freight, $132,500; and of the *Thomas Allen*, with her cargo and freight, $126,775.

The learned judge awarded $12,000 for the salvage service rendered.

Their Lordships are of opinion that this amount is larger than the circumstances of the case justify. The services, though valuable to the *Thomas Allen*, were of a very simple character, unaccompanied by any danger to the *Austerlitz* beyond the ordinary risks of towage, and the fact that the towage was performed at a high rate of speed, and without interruption by breaking of the tow ropes or otherwise, and without damage, except of the most trifling kind, to the *Austerlitz*, shews that it was without difficulty.

The danger from which the *Thomas Allen* was rescued was simply that of any steamship which has lost her propelling power. Their Lordships are advised by their nautical assessor that there was no risk of her drifting on to George's Shoal, and she was in the track of steamers, so that there is no reason to suppose that she would not have obtained the assistance of some other vessel if the *Austerlitz* had not fallen in with her. In these circumstances the award of $12,000 is certainly at a higher rate than that which has been adopted by Courts of Admiralty in similar

circumstances. Their Lordships have felt the hesitation which has so often been expressed at this Board in interfering with the judicial discretion upon a mere question of amount, but their Lordships are of opinion that in this case the difference between the sum which they think would be a liberal remuneration for the services rendered and that which has been awarded is so large as to require correction.

This subject has been very fully considered by this tribunal on several occasions, and the principle on which the Committee proceeds in these cases is very clearly stated in the judgment delivered by Lord Justice James in *The Glenduror* (1). He there says:—"In some of the cases which have been referred to in argument, the difficulty has been stated in very strong language; namely, that this Committee would not enter into the question of quantum when there has been 'nothing to shock the conscience, nothing gross or extravagant' (*The Carrier Dove* (2)). In the case of *The Clarisse* (3) there follows a more accurate expression of the rule according to their Lordships' view. Their Lordships there say:—'It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be considerable to induce a Court of Appeal to interfere upon a question of mere discretion;'" and at the conclusion of the judgment (p. 594) is this passage,—"With respect to the amount of difference of estimate which would justify their Lordships to review the decisions of the learned judge, they were referred to the case of *The Scindia* (4), in which the Court differed to the extent of one third. Unless the difference amounted at least to that, they would not have interfered."

Acting on the principle thus laid down, and being of opinion that $7500 will be a liberal reward for the services rendered by the *Austerlitz*, their Lordships will humbly recommend to Her Majesty that the sum awarded be reduced to that amount, of which the master and crew will receive $1880, and that each party bear his own costs of this appeal.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Hollams, Son, & Coward.*

(1) Law Rep. 3 P. C. 589.
(2) 2 Moo. P. C. (N.S.) 254.
(3) Swabey, 134.
(4) Law Rep. 1 P. C. 241.

[PRIVY COUNCIL.]

J. C.* 1866 Dec. 3, 18.

HAWKSFORD AND RENOUF . . . . DEFENDANTS;

AND

GIFFARD . . . . . PLAINTIFF.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey — Foreign Judgment—Debtors' Trustees cannot be joined as co-Defendants—Practice—Interest on Judgment—Costs.

A judgment creditor, suing in Jersey to enforce a judgment of an English Court, joined as co-defendants the attorney of his judgment debtor, and the attorney of the trustees of the debtor's property:—

Held, that the Jersey Court was wrong in decreeing payment personally against the trustees.

The foreign judgment being no more than evidence of a debt, it was incompetent for the plaintiff to sue other persons jointly with the debtor, on the allegation that they held as trustees property of which the debtor was beneficial owner.

As regards interest on the English judgment, it should not be altered by the Jersey Court except from the date of the Jersey judgment; the costs, moreover, occasioned by joining the trustees should not be given.

APPEAL from a decision of the Royal Court (Full Court, Oct. 13, 1885), affirming a decision of the Royal Court (Inferior Number, July 4, 1885), whereby the appellants, as attorneys for their principals, were ordered to pay to the respondent, as attorney for his principal, £1426 5*s.* 3*d.* and £8 11*s.* 10*d.*, the taxed costs of a judgment obtained in England with interest thereon at the rate of 5 per cent. per annum from the 29th of October, 1884, that being the date of the English judgment, until payment.

The facts are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Heath*, for the appellants.

Jeune, for the respondent.

1886 Dec. 18.

The judgment of their Lordships was delivered by

LORD HERSCHELL:—

This is an appeal from the Royal Court of the island of Jersey. It arises out of the following circumstances:—

* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, and SIR BARNES PEACOCK.

On the 22nd of October, 1869, under an Act of the States of Jersey, a company was incorporated by the name of the Jersey Railway Company, to make a railway from St. Heliers to St. Aubin. In 1875 this company became bankrupt, and Louis Marie thereupon became tenant après décret and owner of the lands and undertaking. On the 6th of February, 1878, he sold all his interest to F. Nalder, who in turn, on the 5th of February, 1883, sold to T. H. Budd.

On the 7th of June, 1871, another railway company was incorporated by an Act of the States of Jersey under the name of the St. Aubin and La Moye Railway Company, to make a railway from St. Aubin to La Moye. This company also became bankrupt, and in 1876 William Lister Holt became tenant après décret. He passed his interest to Horace Henry Holt, who became bankrupt, and under his bankruptcy T. H. Budd became on the 17th of March, 1879, tenant après décret and owner of the lands and undertaking.

In the early part of 1883 a company was formed in England to purchase and carry on these two undertakings, and on the 6th of February in that year the Jersey Railways Company, Limited, was incorporated under the English Joint Stock Companies Acts.

On the 9th of February, 1883, a contract was entered into by T. H. Budd to sell both undertakings, of which he was then the owner, to this company. The company having in view the raising of funds by means of debentures, on the 13th of February duly executed an indenture under which Lord Ranelagh, E. B. de Fonblanque, and F. W. Lowther, became trustees, and by which provision was made for the security of the debenture holders. The terms of this deed will be more particularly referred to hereafter.

On the 11th of July, 1883, Nalder and Budd, who were then the registered legal owners of the property in Jersey, conveyed the same in due form according to the laws of that country to the above-named trustees, who thus became, according to the law of Jersey, the owners of the railway properties. On the 29th of October, 1884, Philip Thomas Blyth (whose attorney in Jersey the respondent afterwards became), obtained a judgment in the Queen's Bench Division of the High Court of Justice against the

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HAWKSFORD AND RENOUF v. GIFFARD.

Jersey Railway Company for £1426 5*s.* 3*d.* debt and £8 11*s.* 6*d.* costs.

To enforce this judgment, the action which gives rise to the present appeal was brought on the 27th of June, 1885, in the Royal Court of Justice in Jersey. The present respondent, as attorney to P. T. Blyth, the judgment creditor, was the plaintiff; and the defendants were F. Hawksford, as attorney to Lord Ranelagh, E. B. de Fonblanque, and F. W. Lowther; and E. B. Renouf, as attorney to the Jersey Railways Company, Limited.

The plaint recited the judgment obtained in the Queen's Bench Division, that the principal and most apparent, if not the entire, property of the company consisted of the two lines of railway with their plant and rolling stock, which were held and possessed by Hawksford, as agent for Lord Ranelagh, E. B. de Fonblanque, and F. W. Lowther, under an instrument of the 10th of July, 1883, and that the company had neglected and refused to satisfy the judgment. It then prayed that Hawksford and Renouf, as attorneys for their principals respectively, should be condemned to pay to the plaintiff the said sums of £1426 11*s.* 3*d.* and £8 11*s.* 6*d.*, with interest thereon at the legal rate from the 29th of October, 1884, until payment, and in addition £50, for damages and extra costs.

Both Hawksford and Renouf objected to being called upon to plead to the action. The former based his objection on the ground that, assuming the judgment to be binding as between the parties to it, it could not be invoked as against the trustees who were not parties to it, and that he ought therefore to be dismissed from the action. It is unnecessary to detail the points taken by Renouf. They were held, as their Lordships think rightly, to be without substance.

The contention of Hawksford was rejected by the casting vote of the Chief Magistrate, and the action then proceeded.

The appellant put in evidence the conveyances of the 11th of July, 1883. He contended that by these conveyances his principals were the owners of the railways, and that the Courts of Jersey could not look behind this ownership at any supposed trusts in favour of the company, as such trusts could only lawfully be created in Jersey, under the law of the States of Jersey relating to trusts of the 24th of September, 1861. He also

insisted that even if the Court could regard any agreement between the company and the trustees, the creditors of the company could have no greater rights against the trustees than the company itself would have, and that the rights of the company only arose after payment of the sum of £60,000 preferentially borrowed.

The respondent put in evidence, in addition to a prospectus issued by the Jersey Railway Company with the object of obtaining £60,000 by way of a loan on mortgage debenture stock, the indenture of the 13th of February, 1883.

This deed was made between the Jersey Railways Company of the one part, and Lord Ranelagh and E. B. de Fonblanque of the other part. It recited that the directors of the company had created a debenture stock of the nominal amount of £60,000, and had determined to offer such stock in the manner thereafter provided; and that the parties of the second part had agreed to act as trustees for the purpose of these presents. It then provided that the company should procure the transfer to the trustees of all their railways, lands, rolling stock, rights, &c., and declared that the trustees should stand possessed thereof, upon trust to permit the company to hold and enjoy the premises, and to carry on thereon and therewith the business authorized by their memorandum of association, until default by the company in payment of interest on the debenture stock, or other breach of their obligations. The 16th article was as follows:—"The stock shall be a first charge on the mortgaged premises, and shall have precedence over all moneys which may hereafter be raised by the company by any means whatsoever."

On the 4th of July the judgment of the Court was pronounced. It recited that the Jersey Railways Company had been formed for the purpose of working the lines of railway from St. Heliers to La Moye. That these two railways and their appurtenances formed the same property as that described in the indenture of the 13th of February, 1883, and were also identical with the properties conveyed by the contracts of the 11th of July, 1883. It further recited that, by the indenture of the 13th of February, 1883, it was established that Lord Ranelagh, Fonblanque, and Lowther only hold the properties granted them by the contracts of the 11th of July, 1883, as "fidei commissaires," or

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trustees for the benefit of the company, subject to the stipulations mentioned in the indenture, and that the object of the contracts of the 11th of July being simply to give effect to the stipulations of the indenture of the 13th of February, the Defendants' principals had between them, the one in law, the other in equity, entire possession of the property of the Jersey Railways Company.

The judgment proceeded, upon the facts thus found, to condemn the appellants, as attorneys for their respective principals, jointly, to pay to the respondent the sums of £1426 5*s.* 3*d.* and £8 11*s.* 6*d.* claimed in the action, with interest upon the said sums at 5 per cent. per annum from the 29th of October, 1884, to the time of payment. It further condemned the appellants jointly to pay to the respondent the sum of £25 damages, and also condemned them jointly in costs.

Upon appeal to the full Court the interlocutory and final judgments were both affirmed, and the appeal dismissed with costs.

It has been necessary to state thus fully the proceedings in the action and the form of the judgment pronounced, inasmuch as the first question for determination is the construction to be put upon the judgment.

Mr. Jeune, on behalf of the respondent, has contended that its effect, as regards the trustees, is only to condemn them to pay the money out of the property of the company now in their hands. Their Lordships are unable so to construe it. The terms used plainly import a personal and unlimited obligation. And it is admitted that the practice of the Courts of Jersey cannot be appealed to in support of a construction of the judgment other than that which their Lordships deem the natural one. Taking the meaning of the judgment to be that which their Lordships have indicated, they entertain no doubt that it cannot be supported. But even if Mr. Jeune could have maintained the view put forward on behalf of the respondent, their Lordships would have arrived at the same conclusion. This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt, and their Lordships do not think it is competent in such an action to sue other persons jointly with the debtor, and to obtain a judgment against them for payment of the debt, merely on the

allegation that they hold, as trustees, property of which the debtor is the beneficial owner. No authority was cited to shew that this course is warranted by the law or practice prevailing in Jersey. And, indeed, it is scarcely possible that there can be any such settled practice, inasmuch as trusts have only been distinctly recognised by the law of Jersey since the Act of the States of 1861.

Much argument was addressed to their Lordships with reference to the effect of the deed of February, 1883. It may be that under the judgment against the Jersey Railways Company execution could issue against the rolling stock and other moveable property of the company in Jersey, and it may be, too, that in a suit properly constituted, the lands also might be made available for the payment of the debt notwithstanding that deed. It is, however, unnecessary for their Lordships to express any opinion upon these points, inasmuch as even if established they would not warrant the judgment appealed from. They will humbly advise Her Majesty that the judgment should be reversed so far as regards the appellant Hawksford, and that judgment should be entered for him in the action with costs, and that the respondent should pay his costs of this appeal.

Their Lordships see no ground for disturbing in substance the judgment obtained against the other appellant Renouf. But they think it should be varied in two respects. The judgment obtained in the Queen's Bench Division carried interest at 4 per cent., but the Court below have condemned the appellant to payment of 5 per cent. interest from the date of that judgment, this being the legal interest upon a judgment in Jersey. It appears to their Lordships that 5 per cent. interest should run only from the date of the judgment in the Royal Court of Jersey upon the judgment there obtained. They think too, that after the words condemning the defendant in costs, the following should be added, "except so far as such costs have been increased by joining the other defendant in the action." In other respects the judgment against the appellant Renouf must be affirmed, and they will humbly advise Her Majesty accordingly.

Solicitors for appellants: *Rodgers & Clarkson.*
Solicitor for respondent: *H. W. Smith.*

[PRIVY COUNCIL.]

J. C.*
1886
Nov. 26, 30;
Dec. 18.

THE COLONIAL INSURANCE COMPANY OF NEW ZEALAND . . . . . } DEFENDANT;

AND

THE ADELAIDE MARINE INSURANCE COMPANY . . . . . } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT, AUSTRALIA.

Insurance of Cargo—"At and from Port"—Commencement of Risk—Insurable Interest.

Where the plaintiffs proposed to insure a wheat cargo "at and from" port, and the defendants, "in accordance with your written request," granted an insurance "from" port:—

Held, that there was a complete contract to insure "at and from" port.

Where a contract of insurance related to wheat cargo then on board or to be shipped in the *D. of S.*:—

Held, that the risk commenced as soon as any portion thereof was on board.

Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors:—

Held, that such delivery from time to time was a delivery to the purchasers, that it vested in them a right of possession and property, and that, consequently, they had an insurable interest in such wheat as had been so delivered.

Anderson v. *Morice* (1 App. Cas. 713) distinguished.

Oxendale v. *Wetherell* (9 B. & C. 387) approved.

It is most desirable that judges in the colonies should comply with the rule of the 10th of February, 1845, as to giving reasons for their judgments.

APPEAL from a decree of the Supreme Court (Nov. 27, 1884), affirming a decree of Way, C.J. (Sept. 19, 1884), sitting as a judge without a jury.

The facts of the case are stated in the judgment of their Lordships.

Graham, Q.C., and *C. L. Torr*, for the appellant, contended first, that there was no contract of insurance. The parties were

* *Present:*—LORD BRAMWELL, LORD HOBHOUSE, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

not ad idem, since the acceptance was in different terms from the proposal. Evidence was not admissible to vary or add to the terms of the written contract, or to shew that "from" really meant "at and from." Secondly, the risk had not commenced when the loss happened. The insurance did not cover a loss occurring during loading and before completion. Its subject-matter was a cargo, i.e., an entire and complete cargo, and the insurance did not operate till a complete cargo was on board. [LORD BRAMWELL:—"Cargo" is a word with different meanings. It may mean one thing in a charterparty, another in a policy, another in a contract of sale.] There was implied evidence that the loading risk was excluded from the insurance. The policy differed from the appellants' ordinary forms, which contemplated covering the loading risk. Thirdly, the respondents had no insurable interest until the cargo was complete. The letters "f. o. b." could not be held to apply to each bag and not to the cargo as a whole, so as to place each bag on delivery abroad at the buyer's risk. The property in the wheat delivered did not pass to the buyers until the cargo was complete, and therefore they had no insurable interest. Consequently the respondents' payment to them was a voluntary one, and they cannot recover over again on the strength of it. *Anderson* v *Morice* (1) applies. Reference was also made to *Borrowman* v. *Drayton* (2); *Kreuger* v. *Blanck* (3); *Jones* v. *Holm* (4); *Gabarron* v. *Kreeft* (5); Phillips on Insurance, sect. 938, citing *Hurry* v. *Royal Exchange Assurance Company* (6); *Mackenzie* v. *Coulson* (7).

THEIR LORDSHIPS intimated that they would hear the respondents upon the point as to insurable interest.

Cohen, Q.C. (*Barnes*, with him), for the respondent, distinguished *Anderson* v. *Morice* (1). In that case the charterers of the ship were the sellers: here they are the buyers. In the one case the goods delivered on board were still in possession of the vendors, and until the cargo was complete the subject-matter of

(1) Law Rep. 10 C. P. 58; 1 App. Cas. 713.
(2) 2 Ex. D. 19.
(3) Law Rep. 5 Ex. 179.
(4) Law Rep. 2 Ex. 335.
(5) Law Rep. 10 Ex. 281.
(6) 2 Bos. & P. 435.
(7) Law Rep. 8 Eq. 368.

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the contract of sale was not in esse. In the other the goods delivered on board were delivered to the purchasers and at once passed under their custody, possession and control. The property in the goods passed to the buyers from time to time immediately they were delivered on board, and the buyers were entitled to bills of lading. The purchase-money was due to the sellers. It is true that if the vendors had failed to complete the contract the purchasers would have had the option of returning the goods delivered, instead of paying for them, but that did not prevent their having an insurable interest in them before doing so. The purchasers could have taken bills of lading for the bags delivered and sold them. In *Anderson* v. *Morice* (1) the shipping documents were under the control of the vendors, and the purchasers were not entitled to them till the cargo was complete. Here the sale was of so many bags at so much per bag. Reference was made to *Rugg* v. *Minett* (2); *Aldridge* v. *Johnson* (3); Leake on Contracts, p. 69; *Langton* v. *Higgins* (4). [LORD HERSCHELL:—The only difficulty against you is the meaning of "cargo." LORD BRAMWELL:—Here it merely means enough bags to fill the vessel.]

Graham, Q.C., replied.

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Dec. 18.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the Supreme Court of South Australia in a suit in which the Adelaide Marine and Fire Assurance Company, now the respondents, were plaintiffs, and the Colonial Insurance Company of New Zealand, and certain other persons to whom it is not now necessary to refer, were defendants. In stating their reasons for the recommendation which their Lordships are about to make to Her Majesty in Council, they will, for the sake of clearness, speak of the parties to this appeal respectively as the plaintiffs and the defendants.

The suit was brought upon a contract of insurance alleged to have been entered into by the defendants with the plaintiffs.

(1) Law Rep. 10 C. P. 58; 1 App. Cas. 713.
(2) 11 East, 210.
(3) 7 E. & B. 885.
(4) 4 H. & N. 402.

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It appeared that, on the 29th of September, 1881, Messrs. Morgan, Connor, & Glyde chartered a vessel called the *Duke of Sutherland* to proceed from Algoa Bay to a good and safe port in New Zealand, and there to load from the charterers a full and complete cargo of wheat in bags, and being so loaded to proceed direct to Queenstown, Falmouth, or Plymouth, at captain's option, for orders to be given within forty-eight hours, to any safe port in the United Kingdom, or on the Continent, &c.

By the terms of the charterparty, all expenses of stowing were to be paid by the ship, freight to be payable at rates specified by charterparty, the cargo to be brought to and taken from alongside at merchants' risk and expense, thirty working days to be allowed for loading, the captain to sign bills of lading for the cargo, according to the custom of the port, at the current or any rate of freight, without prejudice to the charterparty, for which purpose he was to attend daily at the charterer's or agent's office during business hours if so required, and should the freight list according to bills of lading shew a less sum on aggregate than chartered freight, the difference was to be paid in cash prior to the signing of bills of lading. The vessel to have a lien on cargo for freight and demurrage.

Subsequently Messrs. Morgan, Connor, & Glyde received a proposal in a letter, dated the 10th of March, 1882, from the New Zealand Grain Agency, to supply a cargo of wheat for the said vessel at Timaru, at 4*s.* 7*d.*, free on board, provided she had sailed from Algoa Bay for that port, sacks 9*d.* Messrs. Morgan, Connor, & Glyde verbally accepted the proposal.

The *Duke of Sutherland* had sailed from Algoa Bay at the date of the proposal, and she arrived at Timaru before the 30th of March, 1882. The plaintiffs having agreed with Messrs. Morgan, Connor, & Glyde to insure the cargo of wheat for a sum not exceeding £14,000, applied to the defendants, by a letter dated the 30th of March, 1882, to hold them covered for not exceeding £2000, being two-fourteenths interest in cargo of wheat per *Duke of Sutherland*, at and from Timaru to United Kingdom, or Continent, F.P.A. rate charged to be that ruling in New Zealand for similar risks.

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On the same day the defendants by their local managers sent the following answer:—

"Marine Department.
"The Colonial Insurance Company of New Zealand.
"Fire and Marine.
"To Secretary of Adelaide Marine, &c., Assurance Co.
"Adelaide Branch, 30th March, 1882.

"Dear Sir,

"In accordance with your written request of even date, you are hereby held provisionally insured in the sum of (not exceeding) £2000 (being two-fourteenths interest) on wheat cargo now on board, or to be shipped in the *Duke of Sutherland*, —— tons, from Timaru, New Zealand, to United Kingdom or Continent. Warranted F.P.A.

"Declarations to be made upon completion of shipment, and rate to be charged in New Zealand for similar risks.

"We are, dear Sirs, yours faithfully,
"J. EDWIN THOMAS, for Local Managers."

The delivery of the wheat by the New Zealand Grain Agency on board the *Duke of Sutherland* at Timaru commenced shortly after the 30th of March, 1882. Before the completion of the cargo, viz., on the 3rd of May, 1882, the vessel and the wheat on board were lost by the stranding of the vessel during a gale at Timaru. It was admitted by the defendants that the vessel was seaworthy, and that she was lost by perils of the seas. At the time of the loss 2500 bags of wheat out of a total cargo of 13,000 remained to be delivered in order to complete the cargo.

Messrs. Morgan, Connor, & Glyde paid the New Zealand Grain Agency for the wheat which they had put on board, and the plaintiffs having paid Messrs. Morgan, Connor, & Glyde for the loss of the wheat, in accordance with their contract for insurance, called upon the defendants to indemnify them, in accordance with their contract of cover. The defendants denied their liability, and the plaintiffs commenced an action against them in the Supreme Court of South Australia. The cause was tried before the Honourable Samuel James Way, the learned Chief Justice

of the Court, who gave judgment in favour of the plaintiffs, and on motion by way of appeal to the Full Court the appeal was dismissed.

The present appeal is from the judgment of the Full Court. The reasons of the Chief Justice are fully set out, but no reasons for the judgment of the Full Court, which is the one from which this appeal has been preferred, have been communicated pursuant to the rule of the Judicial Committee of the 10th of February, 1845.

Their Lordships think it right to remark upon the absence of such reasons, as it is most desirable that the Judges in the colonies should always comply with the rule.

Upon the argument before their Lordships, the learned counsel for the defendants contended, 1st, that there was no contract of insurance; 2nd, that at the time of the loss the risk had not commenced; 3rd, that the plaintiffs had no insurable interest.

As to the first point, they contended that the proposal by the plaintiffs and the acceptance by the defendants were not ad idem, the proposal being "at and from" and the acceptance only "from" Timaru; and also that the acceptance contained the words, "Declarations to be made on completion of the shipment," which were not in the proposal.

The second point of contention was that, if there was a contract on the part of the defendants, it was merely to insure a wheat cargo from Timaru, whereas the vessel was lost before the cargo was complete and before the commencement of her voyage from Timaru.

Parol evidence was admitted by the Chief Justice to prove that the defendants intended by the word "from" in their letter of the 30th of March to insure at and from Timaru. One of the plaintiffs' prayers in the suit was that the policy should, if necessary, be amended.

The defendants contended that the evidence was inadmissible.

It is unnecessary to determine whether it was admissible or not, for their Lordships are of opinion that upon the true construction of the defendants' letter, independently of any parol evidence, the contract was to insure at and from Timaru, and consequently that the first contention fails.

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The proposal to the defendants was to hold the plaintiffs covered "at and from" Timaru; the defendants' letter commenced, "In accordance with your written request of even date, you are hereby held provisionally insured 'from' Timaru to United Kingdom," &c.

There could be no doubt entertained by the defendants as to the meaning of the words "at and from" contained in the proposal, and their Lordships are of opinion that the answer shewed that their acceptance was intended to be in all respects in accordance and in conformity with the proposal, and that, notwithstanding they used only the word "from" they intended to accept the proposal at and from, and consequently that there was a binding contract to that effect.

As to the contention that the loss happened before the cargo was complete, the answer is that the word "cargo" is a word susceptible of different meanings and must be interpreted with reference to the context. The sellers were to supply a cargo of wheat free on board the *Duke of Sutherland* at Timaru, and the defendants agreed, as a cover to the plaintiffs, to insure, at and from Timaru, a wheat cargo then on board, or to be shipped in the *Duke of Sutherland*. Their Lordships interpret the meaning of the words "wheat cargo," or "cargo of wheat to be shipped on board," to be such a quantity of wheat to be shipped at Timaru as the ship could properly carry, and as the defendants' contract was to insure a wheat cargo then "on board or to be shipped in the *Duke of Sutherland*," &c., the insurance must be construed in the same manner as if it had been on 13,000 bags of wheat to be shipped, &c., at and from Timaru. The risk, therefore, in their Lordships' opinion, commenced as soon as any portion of the wheat was on board. If the sellers had neglected to supply the full quantity of 13,000 bags, and the vessel had been obliged to sail with only 1050 bags, it could not possibly have been contended that, if the ship had been lost on the voyage, the risk had not commenced because only a part of the cargo had been put on board. Their Lordships hold that the risk had commenced before the loss was incurred.

The last objection, viz., that the plaintiffs had not an insurable interest, was the most important one. It depends upon the

question whether Messrs. Morgan, Connor, & Glyde had an insurable interest, for if they had not an insurable interest the plaintiffs had not an insurable interest, and the payment by the plaintiffs to them under their policy was a mere voluntary payment.

The appellants laid great stress upon *Anderson* v. *Morice* (1). The Chief Justice considered that there was a striking resemblance between the facts of that case and those of the present. He proceeded, however, to consider three points which in his opinion constituted a difference between the two cases. Having discussed those points in an elaborate judgment, he arrived at the conclusion that they did not constitute any substantial difference in favour of the plaintiffs, and therefore, but for certain parol evidence which he had admitted on the trial, he would have held that neither Messrs. Morgan, Connor, & Glyde nor the plaintiffs had an insurable interest. Acting, however, upon what he considered to be an admission made by Mr. Glyde during the loading to the effect that he understood that the wheat which had been shipped prior to the loss was at the buyers' risk as it was put on board, the Chief Justice found as a fact that the letters "f. o. b." in the particular contract were used with the meaning that the bags were to be at the buyers' risk immediately that they were put on board, and consequently that the buyers had an insurable interest.

Their Lordships are of opinion that Mr. Glyde's statement as to what he understood was not admissible. He did not prove any additional facts, but merely expressed his opinion, and that at most merely by inference, as to the effect of the contract with the sellers. He merely denied that the wheat was at the risk of the shippers before it was on board. Their Lordships must therefore determine whether or not, independently of what Mr. Glyde was proved to have said, the buyers had an insurable interest. Their Lordships differ from the Chief Justice in this respect, and are of opinion that they had an insurable interest.

In *Anderson* v. *Morice* (1) it was held by the Exchequer Chamber, reversing a unanimous judgment of the Court of Common Pleas, that the property in the rice which was put on

(1) 1 App. Cas. 713.

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board the seller's vessel in the course of completing the cargo, and which was lost by perils of the sea before the cargo was complete, did not vest in Anderson under his agreement for purchase; that there was nothing to shew that it was to be at his risk, and consequently that he had no insurable interest. The decision of the Exchequer Chamber, from which one of the judges, Mr. Justice Quain, dissented, was appealed to the House of Lords, and affirmed, the noble Lords who heard the appeal being equally divided in opinion.

Their Lordships, notwithstanding the great diversity of opinions expressed in that case, are not prepared to throw any doubt as to the correctness of the decision. But admitting it as an authority to the fullest extent, they consider that it is not applicable to the circumstances of the present case.

In each of the cases the insurance was on a "cargo," a word which, as already pointed out, is susceptible of different meanings in different contracts, and which must be interpreted with reference to the context.

In *Anderson* v. *Morice* (1) Anderson agreed with Messrs. Borradaile, Schiller & Co. to purchase the cargo of new crop Rangoon rice per *Sunbeam* at 9*s.* 1½*d.* per cwt. cost and freight, expected to be March shipment. Payment by seller's draft on purchaser at six months' sight with documents attached. The cargo to be purchased in that case was an entire thing, and was not in existence at the time when the contract was entered into, and would not be in existence until the whole cargo should be put on board.

In the present case the vendors did not sell a particular cargo on board a ship chartered by them, but merely offered to supply a cargo of wheat for the *Duke of Sutherland* at 4*s.* 7*d.*, free on board at Timaru. No time or mode was fixed for payment, and nothing was said as to the place to which the cargo, when supplied and put on board, was to be carried, or to the effect that the sellers were to have anything to do with bills of lading or other shipping documents. The purchasers accepted the offer, they themselves being the charterers of the *Duke of Sutherland*, whereas in *Anderson* v. *Morice* (1) the firm who agreed to sell the cargo

(1) Law Rep. 10 C. P. 58; 1 App. Cas. 713.

of rice by the *Sunbeam* were themselves the charterers of that vessel, and were to receive freight for the carriage of the rice, such freight being included in the purchase-money. In putting the rice on board the *Sunbeam* the sellers were not delivering it to Anderson, but were putting it on board a vessel, of which they were the charterers, for the purpose of completing the cargo which they had agreed to sell. The master of the *Sunbeam* received it on their account, and not on account of the purchasers. The purchasers' right was to depend on the shipping documents which were to be under the direction of the sellers. In the present case, in putting the wheat on board the *Duke of Sutherland*, the contractors were delivering it to the purchasers in pursuance of their contract to put it free on board, the master of the vessel which had been chartered by them being their agent to receive it on their account. The shipowners received it under the charterparty by which they bound themselves to load from the charterers a full and complete cargo, and to proceed with it, &c., as ordered by the charterers or their agents. The sellers had nothing to do with the wheat or the destination thereof after it was on board, and by putting it on board they did not render themselves liable to the owners of the ship for freight, demurrage, commission, or any other charges provided for by the charterparty. The master would not have been justified in returning to the sellers any portion of the wheat without the authority of the purchasers, who were entitled under the charterparty to have bills of lading signed for it as directed by them according to the terms stipulated by the charterparty. From the very nature of the contract to supply a cargo of wheat for a ship of 1047 tons register, and which it is admitted would consist of 13,000 bags of wheat, it could not have been intended that the whole supply should be completed at the same moment or even in a single day. By the charter thirty days were to be allowed for the loading, and upon a proper construction of the contract of sale, in which nothing was stipulated as to the time of delivery or payment, the sellers would have a reasonable time to deliver it on board. By the charterparty the cargo was to be brought to and taken from alongside at merchant's risk and expense. By the vendors' contract they were to put it free on board for the charterer, and

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when put on board the master would receive it for the purchasers and hold it for them.

In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, and it must frequently happen, as in contracts for supplies of provision for the army or navy, or any large establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase-money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat put on board from time to time until the whole cargo had been supplied; but it does not follow that they had not an insurable interest before the price was paid or payable. It appears from what follows that a man may have an insurable interest in goods for which he has neither paid nor become liable to pay.

In the present case, if no loss had happened, and the sellers, without lawful excuse, had neglected to supply a complete cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had, at the time of the loss, an interest in the part which had been put on board. In the one case, that they might be able to return it to excuse them from payment for it in the event of their electing to put an end to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay.

In *Oxendale* v. *Wetherell* (1) it was correctly stated by Mr. Justice Parke, that "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of the time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed to perform his

(1) 9 B. & C. p. 387.

contract, the latter may recover the value of the goods which he has so delivered." In the case cited it was decided accordingly. Applying the law as laid down in that case to the present, the purchasers, if no loss had occurred, might, subject to the rights of the shipowners to their lien for freight under the charterparty, have returned the wheat which had been put on board if the contractors had, without any lawful excuse, refused to supply a full cargo within a reasonable time, but they would not have been obliged to do so; they might have retained and paid for the part delivered, and sued the contractors for damages for not completing their contract; on the other hand it is clear that the sellers could not without the consent of the purchasers in the case supposed have taken out of the ship the whole of the wheat which they had put on board, and have compelled the ship to go empty away, because they themselves had failed to complete their contract.

In *Van Casteel* v. *Booker* (1) it is correctly stated by Baron Parke that "a delivery on board a purchaser's ship is a delivery to him, but where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him." In their Lordships' opinion the rule applies to a delivery of goods in part performance of a contract as well as to a delivery of the whole quantity contracted for. In the present case the sellers had no right to give any directions as to the persons to whom bills of lading should be made out, nor as to the place to which the wheat should be carried. So far as the goods delivered were concerned, the seller's obligation as to those goods ceased directly they were put on board. The purchasers might have sold them in New Zealand, and were not obliged, except as between them and the shipowners as regards the freight contracted for by the charterparty, to have had the wheat conveyed to the United Kingdom or the Continent. They had the same right to deal with the wheat which was put on board as they would have had to deal with the whole cargo if it had been completed. In *Dunlop* v. *Lambert* (2) Lord Cottenham, then Lord Chancellor, said, "It is,

(1) 2 Ex. 699.

(2) 6 Cl. & F. 620.

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no doubt, true, as a general rule, that a delivery by a consignor to a carrier is a delivery to the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance, and it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee, for such carrier then becomes his special agent."

In the present case there was a sale, a delivery, and a receipt by the purchasers of the wheat which was put on board. The charterers, and not the contractors, would have been liable to the shipowners for the freight if the wheat had been carried to its destination.

Their Lordships are of opinion that the delivery of the wheat from time to time was a delivery to the purchasers, that it vested in them the right of possession as well as the right of property, and that at the time of the loss it was at their risk. The right which they had to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, did not prevent them from having an insurable interest. The interest in this case was defeasible, not by the vendors, but at the option of the vendees in the event of the vendors not completing the contract.

For the above reasons their Lordships are of opinion that, without taking into consideration the statement made by Mr. Glyde, or the other parol evidence of the intention of the parties upon which the Chief Justice relied, Messrs. Morgan, Connor, & Glyde, and consequently the plaintiffs, had an insurable interest.

They will, therefore, humbly recommend Her Majesty to affirm the judgment of the full bench, and to dismiss the appeal.

The appellants must pay the costs of the appeal.

Solicitor for appellants: *W. H. Chatterton.*

Solicitors for respondent: *Johnston, Farquhar, & Leech.*

[PRIVY COUNCIL.]

DE WAAL . . . . . DEFENDANT;

AND

ADLER . . . . . PLAINTIFF.

J. C.*
1886
Nov. 30;
Dec. 1.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Mora—Sale of Shares—Unreasonable Delay in Delivery.

Where a contract for the sale of shares did not fix the time for the delivery of them:—

Held, that the time for delivery could not depend upon circumstances which were unknown to the buyer, and that delay in tendering the shares arising from the seller having sent his certificate to England for subdivision, as this circumstance was unknown to the buyer, was unreasonable and justified the buyer in refusing to accept the shares. Such delay was mora, assuming the law of mora to be applicable.

APPEAL from a judgment of the Supreme Court (Connor, C.J., and Cadiz, J., Wragg, J., diss.), dated the 13th of September, 1884, in part reversing a judgment of Wragg, J. (August 8, 1884), which absolved the appellant from the instance with costs.

The facts are stated in the judgment of their Lordships.

The trial took place before Wragg, J., without a jury, who found as a fact that Adler Brothers, on the 20th of February, 1884, rescinded the original contract as to the seven shares, and substituted an indivisible contract defeasible by non-delivery by next steamer of a certificate for twenty shares. He also found as a fact that Adler Brothers had authority to make such substituted contract, and further that there was unreasonable delay in delivery of the seven shares.

In reversing the judgment (1) of the Court below, the Chief Justice said:—"In our law, where no day is fixed for the completion of a bargain, there is no delay in the sense of mora unless the person charged with delay is to blame. Mora is defined to be unjust omission in one rightly required to perform his obliga-

* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH,

(1) Natal L. R., vol. v., p. 251.

J. C. 1886 DE WAAL v ADLER.

tions. Blameless delay does not occasion legal mora, nor is there mora while an action would not lie to enforce the contract, nor if the delay is not occasioned by the seller. I do not see that the plaintiff here was blameable for any delay that occurred."

The Supreme Court held that the judgment should have been for the plaintiff for the price of seven shares at £85 per share upon his handing over scrip certificates for the shares.

Cohen, Q.C., and *Mansel Jones*, for the appellant, contended that there had been unreasonable delay. Whether the law as to mora was applicable or not, the respondent was to blame within the meaning of that law as laid down by the Chief Justice. Reference was made to Pothier on the Law of Obligations, by Evans, vol. i., p. 130, and p. 82; Domat, by Strachan, vol. i., p. 89, bk. I., tit. 2, sect. 12, art. 13. They also contended that a decree for specific performance was not authorized by the law of Natal.

Charles, Q.C., and *Wood Hill*, for the respondent, contended that the appellant wrongfully refused to accept and pay for the seven shares. There was no unreasonable delay, and the respondent was not to blame within the meaning of mora. If there was mora it was purged by the tender of the shares. Pothier's Contract of Sale (Cushing's translation), pt. 2, c. 1, art. 2; pt. 5, c. 2, sect. 6; Pothier on the Law of Obligations, by Evans, pt. 1, c. 2, art. 1; pt. 3, c. 7, art. 1; Salkowski's Roman Private Law, pp. 520 and 522. [LORD HERSCHELL referred to *Frost* v. *Knight* (1).] The objection that a suit for specific performance would not lie was not taken in either Court below, nor in the appellant's printed case. It is well-established that such a suit will lie according to English equity, which is recognised by the law of Natal.

Mansel Jones, replied.

1886 *Dec.* 11.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The respondent, Henry Adler, a sharebroker residing at Cape Town, brought an action in the Circuit Court of Durban against

(1) Law Rep. 7 Ex. 112.

the appellant, a merchant in Durban, on three contracts for the sale and purchase of shares in the Rose Hill Gold Mining Company, the first contract being made on the 15th of December, 1883, for the purchase of three shares, the second on the 8th or 9th of January, 1884, for the purchase of four, and the third on the 20th of February, 1884, of three. And in his declaration he claimed £925 "in exchange for said shares, or otherwise the difference between £925 and the price for which such shares may be sold." The plea denied all the material averments in the declaration, and also alleged that on the 18th of February, 1884, it was agreed between the agents for the vendor of the shares and the defendant that the delivery of the ten shares should be made on the incoming of the next mail steamer, that the incoming mail steamer arrived on the 27th of February, and the ten shares were not delivered, and that the plaintiff did not deliver any shares or scrip until the 10th of March, 1884, when he tendered the said shares or scrip, and the defendant refused to accept them.

It will be convenient first to dispose of this part of the defence. It was true that the ten shares were not delivered on the arrival of the incoming mail steamer, and no tender of shares was made until the 10th of March, 1884. Mr. Justice Wragg, who tried the case in the Circuit Court, found that the defendant's agents on the 20th of February rescinded the original contract as to the seven shares, the two contracts being treated as having become one, and substituted a contract defeasible by non-delivery by the next steamer of a certificate for ten shares. And he held that, even if it were conceded that the original contract as to the seven shares was not rescinded or varied on the 20th of February, the defendant would be entitled to an absolution from the instance on the ground that the delay in delivering the seven shares was unreasonable, and gave a judgment accordingly. On appeal to the Supreme Court of the Colony of Natal, the Chief Justice and Mr. Justice Cadiz were of opinion that the contract for the seven shares was not rescinded or varied and another contract for ten shares substituted for it, and that the defendant was not liable for the three shares sold on the 20th of February. So far their Lordships think they were unquestionably right, but they

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proceeded to hold that he was liable for the seven shares. The reason given by the Chief Justice was that by the law of the colony, where no day is fixed for the completion of a bargain, there is no delay in the sense of mora unless the person charged with delaying is to blame, and he did not see that the plaintiff was blameable for any delay that occurred. Mr. Justice Cadiz thought there had not been any unreasonable delay, and Mr. Justice Wragg adhered to his former judgment. Therefore, the Court gave judgment for the plaintiff for the price of seven shares at £85 per share upon his giving delivery of shares to the defendant.

It is unnecessary for their Lordships to give any opinion upon the objection which was made by the counsel for the appellant, that this judgment for a specific performance of the contract was not authorized by the law of the colony of Natal.

The questions which they have to decide are, whether there was an unreasonable delay in the delivery of the certificate for the seven shares, and, if there was, whether the plaintiff was to blame for it. The facts proved are these: The plaintiff, Henry Adler, a sharebroker and merchant in Cape Town, on the 15th of December, 1883, held forty-six shares in the Ross Hill Mining Company, one certificate of forty shares and one of six. The office of the company was in London. On the 6th of December he handed the certificate of forty to his brother, to be sent to England for subdivision into certificates for smaller numbers, which did not reach Cape Town until the 19th of March, 1884. The other six shares were transferred to one of the purchasers of the twelve shares afterwards mentioned, and need not be further noticed. On the 15th of December, 1883, William Henry Adler, a merchant in Durban, of the firm of Adler Brothers, received from Wallis Short, as agent for then undisclosed principals, an offer to buy twelve shares in the Ross Hill Mining Company, at £85 per share; William Henry Adler on the same day, as agent for the plaintiff, who was also undisclosed, accepted the offer, and telegraphed to him from Durban, "We (Adlers) have sold twelve Ross Hill at eighty-five cash, delivery of scrip here. Confirm by wire." The telegram in reply is not in the record, but it appears from a telegram from Adler Brothers

to the plaintiff, on the 4th of January, 1884, that on the same day the plaintiff confirmed the sale by telegram. On the 21st of December Mr. Short, in a letter to Adler Brothers, declared his principals, one of them being the defendant, for three shares. About the 5th or 6th of January, 1884, the defendant authorized Adlers to buy three more shares, at £85. On the 8th he went from home for the benefit of his health, and left a cheque with his book-keeper for £510 for the six shares. On the 9th W. H. Adler wrote to him that they had not been able to get less than four shares, and had bought them for him at £85 a share, and requested him to instruct his book-keeper to pay £595 when required. He, by a letter undated, but written on the 11th of January, agreed to take the four shares, and immediately forwarded to the book-keeper an additional cheque for £85. Mr. W. H. Adler said on cross-examination, he did not know that the shares had to be sent to England to be subdivided, and at the time of the sale he thought the shares were deliverable within a short time. It is clear from the defendant's conduct that he also thought so, and he did not know that the certificate of the forty shares had been sent to England. He returned home about the 22nd of January, and finding that the shares had not been delivered or the cheques called for, he complained of the delay, and continued to do so up to the 18th or 19th of February, when he was told that the plaintiff had a certificate for ten shares, and he agreed to take the remaining three at £50 a share, on condition that a certificate for ten shares should be delivered to him by the first steamer, which it has been seen was not done.

These contracts were not for the sale of specific shares, and might have been performed by the delivery of one or more certificates, comprising altogether the number of shares sold. The seller was bound to deliver the certificates within what would be a reasonable time in an ordinary contract for the sale of shares, and the reasonableness of the time cannot depend upon circumstances which were unknown to the buyer, and were not disclosed to him by the seller. Assuming that the right to complain of delay in delivery under the first contract was waived by the second, and that the time for the delivery of the whole seven shares was to date from the 9th of January, 1884, there was

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certainly an unreasonable delay. Mr. Woolf, the partner of W. H. Adler, and who transacted the sale of the three shares on the 20th of February, said, in his evidence, that he told the defendant he had a perfect right in his opinion to refuse delivery, and so wired to Mr. Henry Adler. This telegram was sent on the 29th of February, and was as follows: "We (Adlers) shall only honour your draft if we are sure De Waal will accept. He is certainly entitled to refusal." The offer of the seven shares by the letter of the attorneys of the plaintiff was not made till ten days afterwards. This was the opinion of a man of business, and it does not appear that the plaintiff sent any reply to it. Their Lordships consider there was an unreasonable delay.

It remains, then, to consider the reason of the Chief Justice. As to that their Lordships observe that Mr. Justice Wragg did not take that view of the law, nor, apparently, did Mr. Justice Cadiz. The Chief Justice says, "Mora is defined to be unjust omission in one rightly required to perform his obligations." It may be that the question of mora arises only where damages are sought for a breach of contract. It is not necessary to decide whether it does so, for, assuming that the law as stated by the Chief Justice is applicable to this case, their Lordships are of opinion that there was an unjust omission on the part of the plaintiff in the sense in which these words are used by the Chief Justice, and they cannot agree with him that the plaintiff was not blameable for a delay which was caused by his having parted with the documents of title. They will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and the appeal to that Court be dismissed with costs. The respondent will pay the costs of this appeal.

Solicitors for appellant: *Johnson, Budd, & Johnson.*
Solicitors for respondent: *Dawes & Sons.*

[PRIVY COUNCIL.]

In re YATES & KELLETT'S PATENT.

J. C.*
1887
Feb. 3.

Patent—Petition—Rule 9—Accounts.

Petition for prolongation dismissed on the ground that proper accounts had not been produced to shew the remuneration of the patentee.

Rule 9 not having been complied with, a postponement to amend the accounts filed was refused.

THIS was a petition for the prolongation of letters patent dated the 26th of April, 1873, which had been granted to Thomas Edward Yates and Henry Yates, card manufacturers, and W. H. Kellett, a card setting-machine maker, for the invention of "an improvement in the construction of wire cards to be used for combing or straightening fibre, such as wool, cotton, flax, &c., preparatory to spinning."

Aston, Q.C., and *Chadwyck Healey*, for the petitioners.

Sir *R. Webster*, A.G., and *R. S. Wright*, for the Crown.

Reference was made to the 9th rule framed under 5 & 6 Will. 4, c. 83, and to *Wield's Patent* (1); *Saxby's Patent* (2).

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the petitioners have not complied with the rule of this Committee which requires that the balance sheet of expenditure and receipts relating to the patent in question shall be lodged not less than one week before the day fixed for hearing the application. Within a day or two of the present time there has been lodged a balance sheet of one of the patentees who has carried on the manufacture of the patented article in combi-

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) Law Rep. 4 P. C. 89. (2) Law Rep. 3 P. C. 294.

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nation, as is now said, with the manufacture of other articles. No allusion to that matter has been made in the petition. All that the petition says is this:—"As will appear by your petitioners' accounts certain profits have been made, but, as your petitioners submit, no remuneration in any way commensurate with the great merit and public utility of the said invention has been received by your petitioners." There is no intimation there that one of the patentees has carried on business in the patented article paying no royalty whatever for the use of the patent by contract with the other patentees. When the accounts of their manufacture are produced they appear to be the accounts of James Yates & Son (that is the name of the firm) as manufacturers of the patented card. There is no intimation that there was any other manufacture carried on excepting that of the patented card. When the accounts are looked at, it appears that during the first half of the fourteen years over which they extend there were very large receipts on account of sales of the article made, and that during the second period the receipts dwindled away to something very trifling. There is no attempt to distinguish on that side of the account between the receipts in respect of the patented article and the receipts in respect of the other articles which are now said to be manufactured by the firm. On the other side of the account there is no attempt to distinguish between the earlier years and the later years of the business. All the expenses are lumped together, and the effect is that it is impossible to distinguish in these accounts how much of the cost that is charged is due to these later years in which practically no business was carried on, and how much is due to the earlier years in which a larger business was carried on, and in which, for aught their Lordships know, considerable profits may have been made by the use of the patent and the sale of the patented article.

Now the explanation of this given at the Bar is that the patentee who has carried on this manufacture has destroyed his books, and that the materials are not forthcoming out of which a better account might be made. The patentee was in difficulties, or started afresh, and the destruction of his books, for aught their Lordships know, may have been a perfectly honest and reason-

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able operation for him to perform; but he cannot escape from the consequences, and a man who is bound to shew what his profits have been before he can come for a renewal of a patent, if he destroys his books, destroys the very means upon which he must rely for the renewal of his patent. Their Lordships, therefore, think that they cannot comply with any suggestion that there should be further time to amend these accounts. It is a case in which they certainly would not strain a point to relieve the petitioners from their non-compliance with this useful and proper rule, and they think that they are bound to dismiss this petition on the ground that proper accounts have not been produced to shew the remuneration of the patentee.

Solicitors for petitioner: *Bell, Brodrick, & Gray.*
Solicitor for the Crown: *The Treasury.*

[PRIVY COUNCIL.]

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1886
Nov. 11, 12, 16.

OCTAVE CHAVIGNY DE LA CHEVROTIÈRE . . . . . } PLAINTIFF;

AND

LA CITÉ DE MONTRÉAL . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Canada—Public Highways—23 *Vict. c.* 72, *s.* 10, *sub-s.* 6.

By Canadian as by Scotch law when a street or road becomes a public highway, the soil of the road is vested in the Crown or other public trustee in trust for that public use.

Where a road or place in Montreal had been registered as a public place of the city under 23 Vict. c. 72, s. 10, sub-s. 6, and had been enjoyed by the public as a public way more than ten years before registration, and more than ten years after registration, and before suit:—

Held, that, independently of the public right by common law (which had been established in the case), such place had become a public highway, and a private right to resume possession thereof could not be entertained.

APPEAL from a decree of the Court of Queen's Bench (Sept. 19, 1883) affirming a decree of the Superior Court for Lower Canada

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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in the province of Quebec, district Montreal (April 30, 1879). The respondents were the mayor, aldermen, and citizens of Montreal, who were incorporated in 1840 by a provincial ordinance of Lower Canada (4 Vict. c. 36), and specially empowered as to market-places by 8 Vict. c. 59.

By his declaration the appellant stated: that by 36 Geo. 3, c. 9 (Quebec), the control of the market-places of Montreal was given to the magistrates of Montreal, with power to establish new markets, which powers they retained until the incorporation of the city of Montreal; that, by deed dated the 29th of December, 1803, Périnault and Durocher granted, by way of gift, to the magistrates, a piece of land for the sole purpose of a public market-place, and not to be employed for other purposes; that accordingly it was, by the same deed, expressly stipulated that the grantors, their heirs and assigns, should have, in all future time, the right to re-enter into the property and possession of the said land the moment it should be turned to other uses than that of a public market-place; that thereupon the magistrates took possession of the said land, and made it a public market-place, called "Nouveau Marché," or "Marché Neuf"; that it continued so to be used, in conformity with the said deed, until the beginning of 1847; that by 4 Vict. c. 36, all the rights and powers of the magistrates, and particularly those relating to market-places above-mentioned, passed to the defendant corporation, which powers had been confirmed by subsequent Acts; that on the 2nd of January, 1847, the said market was abolished, ceased to be a public market-place, and was turned into and has ever since been used as a road, under the name of "Place Jacques Cartier"; that by reason of that change the right of re-entry reserved by the deed came into effect, and from that date the heirs and assigns of Périnault and Durocher have the right to reclaim the said land from the defendant corporation; that, partly by succession and partly by assignment, the appellant is actually proprietor of 7,293/8,064 parts of the said property, which he has a right to reclaim from the defendant.

The respondents pleaded (inter alia) that the clause of re-entry was only intended to ensure the establishment of a public market upon the square at the time of the execution of the said deed

of donation, and could not be construed as binding upon the respondents for ever, and that it had been sufficiently complied with by a public market having been in existence upon the square for upwards of forty years as aforesaid; that the object of the deed was to discharge the obligations which Périnault and Durocher had incurred towards the purchasers from them of certain building plots, and that Périnault and Durocher having disposed of all the property vested in them, and as to the said building plots with a warranty of frontage upon a public market-place, the rights had forthwith passed to such purchasers; that the clause was merely "comminatoire" and could not give the representatives of the said Périnault and Durocher the right to the relief which they claimed; that they were empowered by statute to do as they had done, and that the remedy for damages was barred; that by virtue of the deed and the different statutes by which they were incorporated as well as by virtue of possession for more than seventy-three years, they were the sole owners of the property claimed by the appellant.

They also pleaded acquiescence, and that the property had for thirty years or thereabouts been abandoned to the public as a public square, and had been duly registered as such in the register of streets kept in the public records of the respondents, and that such property formed part of the public domain, and was for every purpose a public square, avenue, or promenade.

Fullarton, and *Lacoste*, Q.C. (of the Canadian Bar), for the appellant, contended that the conditions of the deed of gift had been broken, that the grant was defeated, and the appellant was accordingly entitled to re-enter. The power of the owner of land to make his grants subject to any conditions he likes is recognised by French law. He can give subject to a condition of defeasance, or that the donee must always use it in a particular manner: Troplong, Droit Civil Expliqué, Donations entre vif, vol. i., No. 355; Code Civil, arts. 760, 1088. The conditions here were not comminatoires, but entitled appellant to re-enter upon breach: Troplong, Vente, vol. i., No. 61. They did not create any servitude attached to the adjacent lands, but a personal right in the donors passing to their heirs and assigns. The respondents

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could not prescribe against their own title, nor change the nature of their own possession: Pothier, vol. viii., c. 2, s. 32, tit. "Possession"; Civil Code, art. 2208. With regard to 18 Vict. c. 100, s. 41, sub-s. 9, relied on by the other side, it had no application to the city of Montreal, and if it had on its true contruction it afforded no defence to the action. Reference was made to Consol. Stat. Low. Can., 1860, c. 85, ss. 1, 2, repeating 13 & 14 Vict. c. 15, ss. 1, 2, of the province of Canada, and to 23 Vict. c. 72, s. 10, sub-s. 6, which it was argued did not apply to a user under a conditional grant, and gave only a primâ facie title against adverse claimants: *Guy* v. *City of Montreal* (1). There have been no acts of the proprietor of this land which amount to a dedication. Nor have the public acquired a right of way; but if they had, this would not defeat appellant's right as against respondents: see 3 Kent, Com. p. 451; *Trustees of the Rugby Charity* v. *Merryweather* (2). The owner who is out of possession cannot be bound by any acquiescence by his lessee for however long a term: *Wood* v. *Veal* (3); *Winterbottom* v. *Lord Derby* (4). Here the owner was out of possession.

Sir *H. Davey*, Q.C., and *Pauli*, for the respondent, contended that the judgment of the Court below was right. From the 2nd day of January, 1847, to the 30th of December, 1876, the Place Jacques Cartier was used by the public without interruption as a public square, avenue, or promenade. It was registered pursuant to statute in a book kept for that purpose by the surveyor of the city. For upwards of ten years previously it had been opened for the public use. Reference was made to 8 Vict. c. 59, and a bye-law of the council dated the 23rd of December, 1846; 18 Vict. c. 100, s. 41, sub-s. 9; 23 Vict. c. 72, s. 10, sub-s. 6; 37 Vict. c. 51, ss. 63, 195; *Mignerau* v. *Legaré* (5); *Guy* v. *City of Montreal* (1). This is a case of twenty years' acquiescence by those who allege that they are interested in a user adverse to their alleged rights. The presumption arising therefrom in favour of a dedication must be rebutted. Reference was made to

(1) 1 Déc. Court d'Appel, 51.
(2) 11 East, 376, n.
(3) 5 B. & A. 454.
(4) Law Rep. 2 Ex. 316.
(5) 6 Quebec L. R. 120.

Turner v. *Walsh* (1); *The Queen* v. *Petrie* (2); Civil Code, art. 779. Although a donor may stipulate certain reservations, it is a question whether this is a voluntary deed, and whether the circumstances under which it was made were not of that character that a consideration may be said to have arisen out of them.

Fullarton replied.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

The action from which this appeal arises was commenced in the Superior Court of the province of Quebec, Lower Canada. The demandant, who is also the appellant, claimed to be proprietor of about seven-eighths of that part of the city of Montreal which from 1803 to January, 1847, had been a public market, and from January, 1847, to the present time has been an open public place in the city, known as the Place Jacques Cartier. The demandant claimed against the respondents, the city of Montreal, a right to resume possession of that piece of land as in the original ownership of the grantors. His money claim against the city amounted to $180,866. Further, he claimed that the original deed of grant of the 29th of December, 1803, should be brought in and declared null and void. The claim is said to have arisen under that deed so often referred to in the course of the case.

It was said to have been a purely voluntary gift, but their Lordships think, if it were necessary to express an opinion on it, it might be doubtful whether it was voluntary, and whether its true character was not a grant to the magistrates of the city of Montreal for valuable consideration.

The place in question was originally the property of the Seminary of Montreal, and the Seminary, being about to dispose of it, entered into a treaty with Périnault and Durocher. The property appears to have been made over to Périnault and Durocher to make the most they could of it, but under a condition that they were to pay to the Seminary a sum of about 3000 guineas. They proceeded accordingly to divide it for building

(1) 6 App. Cas. 636. (2) 4 E. & B. 737.

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purposes; but reserved a portion, and they entered into treaty with the concessionnaires, who stipulated that there should be not only the Rue de la Fabrique (which did not then exist as a street, but was projetée only), and also that the open space lying between the Rue de la Fabrique and the Rue St. Charles should be converted into a public market. Périnault and Durocher, being unable to comply with that condition without the aid of some public body, applied to the magistrates at Montreal, as they could create a public market, and it was necessary to seek their aid, and out of this sprang the grant of the 29th of December, 1803.

The result of that deed seems to be, that it created a public right as well as a private servitude—that is, when that deed had been carried out by converting the open space, which is now the subject in question, into a public market-place, with a right in the public to resort to it as a public market place—it became subject to that public right, at the same time, possibly, being subject to a private servitude to the parties who had become concessionnaires of the building plots. Their Lordships do not find it necessary to express any opinion upon the general construction, or upon the effect of the condition contained in the grant of 1803. They assume, but for the purposes only of the judgment which is about to be delivered, that the demandant's contention may be right, that when there was a breach of that condition the donors or their representatives would be entitled to re-enter and to resume possession as of their former estate.

Several questions of very considerable importance and difficulty have been raised before this Committee. One was suggested by one of their Lordships—whether the condition was apportionable, and, if not apportionable, whether the demandants could sue, not being the owners of nor interested in the whole of the property which is the subject-matter of the condition. On that question also their Lordships do not find it necessary, in their present judgment, to express any opinion.

There were also questions whether the condition of re-entry was void in its inception, whether it was a condition of re-entry properly, or was merely inserted in the deed of gift in terrorem, and merely comminatoire.

There was also a question of prescription and other questions in the case upon which their Lordships do not propose to express any opinion, as the appeal may be disposed of on another and satisfactory ground.

The magistrates of Montreal having got possession of the land under that deed of 1803, and converted it into a public market, we come next to the Ordinance of 4 Vict., by which the magistrates ceased to be the managing body of the city of Montreal, and were replaced by a quasi-corporate body. That leads to the 8 Vict. c. 59. The magistrates in Montreal had accepted this deed of 1803, which, whether it was for valuable consideration or a simple voluntary deed, was a deed of grant for ever. The words are "maintenant et à toujours"—but subject to the condition, whatever the effect of it was. Therefore, at the time of the incorporation of the city, the magistrates were, as trustees for the public, in ownership of this land in perpetuity, subject to the condition, with this market upon it; and over this public market place, not inhabitants of the city alone, but the public at large had acquired considerable rights.

That being the position of affairs, there came the Canadian statute of 8 Vict. c. 59; that statute is not a general Act dealing with all corporations, but with Montreal alone. It is to give greater potency and effect to the incorporation of the city of Montreal and to enlarge the powers of the corporate body. It gives them very extensive powers over the city, and amongst other things it says, in the 50th section, that they shall have power of "changing the site of any market or market-place within the said city, or to establish any new market or market-place, or to abolish any market or market-place now in existence, or hereafter to be in existence in the said city, or to appropriate the site thereof, or any part of such site, for any other public purpose whatever, any law, statute, or usage to the contrary notwithstanding; saving to any party aggrieved by any act of the said council respecting any such market or market-place any remedy such party may by law have against the corporation of the said city for any damage by such party, sustained by reason of such act" of the corporation.

Now it was contended that, acting under that statute and con-

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verting this market-place to another public purpose, was no breach of the condition, and that the effect of the statute was to discharge the condition and leave it open to the corporation, acting for the public interests, to appropriate the site of that market-place to any other public purpose, but subject to a claim for compensation by the demandant here and the parties he represents, if they had title, and had been injured by the act of the corporation. Now upon this very important question as to the effect of this statute, their Lordships do not think that it is necessary at present to express any opinion.

Proceeding under the powers that they had so obtained in December, 1847, the first bye-law was made. In that, the corporation indicate their intention to abolish this market and apply the site to another public purpose, and their Lordships can have no doubt, that in taking that step the corporation were moved only by considerations of public good. They found it necessary probably to supply the growing city with a larger market-place, for Montreal in 1847 was a very different place from the Montreal of 1803, growing and extending every day, and still growing and becoming one of the most beautiful cities in the world. They very likely thought that a larger market-place was necessary, but that they ought to retain the space occupied by the market as an open space for the public good and the public health, and hence they converted it into the Place Jacques Cartier.

In January, 1847, the act of conversion was made complete, and there was also a subsequent bye-law by which they directed that the new place should be henceforward called the Place Jacques Cartier.

Their Lordships assume also, for the purposes of the case, that, upon the happening of these events, whatever rights, if any, the demandant or those he represents had under the condition in the grant of 1803 came into existence in January 1847, that is, that they were then entitled, if at all entitled, to put their claims in force and to institute a proceeding against the corporation to take advantage of the condition annexed to the gift of 1803, and to resume possession of this plot of ground or to get compensation for the act of the corporation. But they did not do so, and things went on as before from 1847 to 1852. The effect of the

transaction of January, 1847, was, to convert, by the act of the corporation, the old market-place into a public square which the citizens of Montreal and the public had a right to use.

Things continued in that condition down to 1852, when Perrin instituted his action. That action may be described with substantial accuracy as similar to the present. It made the same case. The present demandant is the assignee of Perrin's interest. Perrin's action the corporation defended. They put in exceptions similar, save in one respect, to those now before their Lordships. It was allowed to sleep for some six years. The case was then set down for hearing before the proper Court in Canada, and was dismissed, either for want of prosecution, or on the merits. Perrin never instituted any other proceeding. He appears to have lain dormant for nineteen years, and in 1876, for a nominal sum, to have assigned this large claim over to the present demandant. In all that interval the public had been using this public place, and it was not using it privately, it was not clam, but it was openly and as of right, without any interruption by the parties or any of them who are now represented to have had the property in the place. Mr. Fullarton relied very much on this action of Perrin's and a petition that came in from some outside parties. Who they were we do not know; but it was a petition which was not acted upon, and it is open to the suggestion that it was the existence of that petition that suggested the action of François Perrin. However, Perrin never took a step further, and it appears to their Lordships that the absence of any contestation of the right of the public to use this place as a public highway is clear evidence of acquiescence in the public right, or rather of abandonment of the claim, if any, that François Perrin had.

Their Lordships desire to point out that, independently of the statutes, there is evidence of a long-continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right. There seems to be no difference between the law of Lower Canada and the law of England and Scotland in that respect. The public had enjoyed the right from 1847 down to the commencement of the present action. They had enjoyed it

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openly, claimed it, not privately, but adversely, and as of right, and in the meantime there had not been a single step on the part of the present claimant, or those from whom he derives title, to dispute that right, but, on the contrary, there was the amplest evidence of acquiescence in the public enjoyment. There has been made out, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large, had rights, which the law would give effect to independently of the provisions of any statute.

The 18 Vict. c. 100, Lower Canada, does not apply to Montreal, but deserves attention. Montreal is excepted from the operation of that Act, but it applies to every part of Lower Canada save Montreal and some other excepted places, and it contains this provision, that "every road declared a public highway by any procès verbal, bye-law or order of any grand voyer, warden, commissioner or municipal council legally made and in force when this Act shall commence shall be held to be a road within the meaning of this Act until it be otherwise ordered by competent authority." That was the Act adverted to by Chief Justice Dorion. He intended to refer to the 23 Vict. c. 72, which applies to Montreal alone. It deals with the property of Montreal. It deals with the powers of the corporation and extends them beyond the Act of the 8 Vict. In sub-sect. 6 of sect. 10 of that Act (23 Vict. c. 72) there is this special provision:—"The said council" (that is the council of Montreal) "shall also have power to cause such of the streets, lanes, alleys, highways, and public squares in the said city, or any part or parts thereof, as shall not have been heretofore recorded or sufficiently described, or shall have been opened for public use during ten years but not recorded, to be ascertained, described, and entered of record in a book to be kept for that purpose by the city surveyor of the said city, and the same when so entered of record shall be public highways or grounds; and the record thereof shall in all cases be held and taken as evidence for their being such public highways and grounds."

Proceeding under this Act, the corporation did in 1865 register the Place Jacques Cartier as a public place of the city. Their Lordships have no doubt that the registration was valid, and has been amply proved. If any objection had been taken at the trial before the Canadian judge, it would have been the easiest thing possible to produce the original book, but a certified copy of the entry of registration was admitted in its place.

The Place Jacques Cartier had been from 1847 up to 1865 (more than ten years before registration) enjoyed by the public as a public way, and it was enjoyed as a public way more than ten years after the registration and before the present action was commenced; and it seems to their Lordships that the case comes within the express language of that statute, and their Lordships have no doubt that, when the local legislature passed this Act they knew the state of things in the city, intended to provide for it, and did provide for it in strong and emphatic language, saying, that when a street or road should have been opened for public use during ten years and placed upon the register it should be a public highway.

Their Lordships are of opinion that, even if the common law question did not arise, still, there having been antecedent to this registration, and posterior to the registration, the statutable time during which the place should be used as a public street to give operation to the statute, the statute then applies, and upon that registration the Place "Jacques Cartier" became a public highway. There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway the soil of the road is vested in the Crown if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that public use. It was admitted in the argument for the appellant that such was the law of Lower Canada.

Their Lordships being of that opinion, which is in accordance with the principles deduced from *Guy* v. *Corporation of Montreal* (1), and with the principles on which the Court of

(1) 1 Déc. Court d'Appel, 51.

J. C. 1886 OCTAVE CHAVIGNY DE LA CHEVROTIÈRE v. LA CITÉ DE MONTRÉAL.

Queen's Bench for Lower Canada appears to have decided this case, will therefore humbly advise Her Majesty that the judgment of the Court of Queen's Bench for Lower Canada, which is also the judgment of the Superior Court, should be affirmed, and that the present appeal should be dismissed with costs.

Solicitors for appellant: *Simpson, Hammond & Co.*
Solicitors for respondent: *Wilde, Berger & Moore.*

[PRIVY COUNCIL.]

J. C.* 1886 *Dec.* 2, 11.

BINNEY . . . . . PLAINTIFF;

AND

MUTRIE AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Law of Partnership—Winding-up—Accretion to Capital of the Partners—Distribution of Surplus Assets—Lien.

Where in keeping their accounts partners had treated their respective shares of the declared or estimated profits of each year as accretions to their respective capitals:—

Held, that the profits of the year ending with the dissolution of the firm could not be so treated.

Held, further, that the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution. The residue or deficiency will be profits or losses, in either case divisible in the agreed proportions. The rateable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up a deficiency, and to the claim of any of the partners against the entire assets to answer it.

THIS was an appeal from three orders of the Supreme Court of British Honduras, dated the 1st of June, the 1st and 28th of July, 1885, and made on further directions in a suit brought by the appellant for a partnership account, and to wind up certain partnership affairs.

The appellant, for some years prior to 1879, carried on business

* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, and SIR BARNES PEACOCK.

as a merchant in Belize, under the firm of William Guild & Co. Latterly, the respondent Mutrie became a partner with him to the extent of a fourth share therein. The respondent Currie was a bookkeeper, with a fixed salary. On the first of February, 1879, a new partnership was made, under the same style or firm. The respondent Currie was admitted as a partner, and the parties to this appeal were interested therein as follows:—The appellant, 40 per cent.; the respondent Mutrie, 35 per cent.; the respondent Currie, 25 per cent. The partnership was to last for five years, and expired on the 31st of January, 1884.

The original capital of the new firm consisted of the stock-in-trade of the then lately terminated partnership, and of book debts. The Chief Justice said:—"The former was taken over at a valuation, and the debts, less an amount carried to suspense account, were accepted as capital. I would merely remark here that there is an unhappy conflict of evidence as to this suspense account, but that part of the case is not now before me."

The suit was brought on the 9th of April, 1885, by the appellant, for the purpose of taking the accounts and winding up the partnership. It appeared that all the liabilities of the firm had been provided for, and that there were considerable surplus assets, both realized and in course of realization. The question in the appeal was as to the principle upon which these surplus assets should be distributed, and what inquiries should be directed in order to ascertain the proportions in which they are distributable and to finally adjust the accounts between the partners.

It appeared that the appellant contributed nearly the whole of the original capital, Currie his savings as a bookkeeper, Mutrie a still smaller amount. The credit balances at the end of the five years were: Binney $214,815, Mutrie $58,422, Currie $60,762. They were mainly arrived at first by crediting the partners with large estimated profits in the agreed proportions every year, amounting in the five years in all to $225,000; second, by crediting the partners annually with interest on their credit balances, at 5 per cent.; third, by crediting the appellant with $2500 annually for the rent of the partnership premises.

In his judgment of the 1st of June the Chief Justice said:—"The liabilities of the firm have either been met, or are in course

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of liquidation. After making due provision for these liabilities there remained a surplus, and it is with respect to the application of this surplus that the parties to this suit are at issue. The plaintiff asks for a direction that it may be applied in payments of the original capital contributed by each of the partners, together with interest at 5 per cent. The defendants, on the other hand, seek a direction that the surplus may be divided rateably between the partners according to the amount of the respective capitals of the partners at the date of the dissolution of the said partnership." The Chief Justice made his direction in the terms prayed by the defendants, premising that if they had asked that their shares of profits, so far as they had been left in the business, should be treated as capital advanced by them, and as such entitled to rank in priority next after debts to third persons, he was not certain that they might not have done so successfully.

The terms of the order as actually made were that the surplus assets ought to be divided rateably between the partners, according to the amount of the respective capitals standing to the respective credits of the partners at the date of the dissolution of the said partnership.

Macnaghten, Q.C., and *Cowell*, for the appellant, contended that this order was wrong. The appellant should first be paid the agreed rent. The assets should then be applied to repay the original capital with the agreed interest at 5 per cent. The residue should be divided as profits in the agreed proportion, regard being had to what the partners had already drawn. But the same result would be attained if the credit balances at the end of the firm or some earlier date were accepted as the respective capitals of the partners; in that case the deficiency resulting from those balances being largely composed of paper profits not represented by any corresponding assets, should be treated as a loss to which the partners must contribute in the agreed proportion. The appellant should be declared to have a lien on the assets in respect of the respondent's liability to contribute. Reference was made to *Nowell* v. *Nowell* (1); Lindley (4th ed.), vol. i. p. 805; *Wood* v. *Scoles* (2); *Whitcombe* v. *Converse* (3).

(1) Law Rep. 7 Eq. 538. (2) Law Rep. 1 Ch. 369. (3) 119 Mass. 38.

Rigby, Q.C., and *Cutler*, for the respondents, contended that the order of the Chief Justice was right, and that special leave to appeal therefrom had been erroneously granted. The order was not appealable.

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Macnaghten, Q.C., replied.

The judgment of their Lordships was delivered by

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LORD HOBHOUSE:—

Of the three orders appealed against, the only important one is that of the 1st of June, 1885. It is in fact the only order in the case which decides anything between the parties, for the first order only directs generally that the accounts are to be taken. The order of the 1st of June lays down a principle of division of the assets calculated to affect the rights of the parties materially.

The Court declares that the surplus assets remaining after payment of all partnership debts and liabilities ought to be divided rateably between the partners, according to the amount of the respective capitals standing to their respective credits at the date of the dissolution, that is, on the 31st of January, 1884.

Their Lordships take it to be clear that the claims of each individual partner against the partnership are not partnership liabilities within the meaning of the order. The order therefore directs exactly the same distribution of the assets among the partners, whether the accounts shew a profit, a loss of capital, or an exact balance. But as by the partnership articles, profits, and losses are not to be shared in the ratio of the respective capitals, it is obvious that the distribution directed by the order cannot be according to the contract, except in the very improbable contingency of an exact balance.

The partnership commenced on the 1st of February, 1879, and expired on the 31st of January, 1884. It was formed for the purpose of carrying on the business previously carried on by Binney and Mutrie, and with the capital employed in that business, but admitting Currie as a partner, and adding to the capital a debt due to him by the old firm. The second of the partnership articles provides that the business (by which the parties

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evidently mean profit and loss) shall be divided into 100 parts, of which Binney shall have 40, Mutrie 35, and Currie 25. By the eighth and ninth articles Mutrie and Currie agree to allow their shares of profits, after drawing sums of which the maximum is fixed, to accumulate for their benefit. And by the tenth article interest at the rate of five per cent. per annum is to be allowed on the amount of the credit of each partner from the 1st day of February in each year.

The amount of capital thus brought in by Currie was an ascertained sum, but the capital provided by the others, depending as it did upon the outstanding credits of the old firm, could only be the subject of estimate. It was so entered in the books, and the original estimates were altered on account of bad debts. It appears to be still the subject of dispute whether the altered amount entered in the books was so entered by agreement with Binney, and their Lordships do not propose to do anything to disturb a settled account if there is any. But so far as appears on the face of the accounts in this record, they are founded on entries of capital which are estimates only, and also on declared profits which are estimates only, and it is open to all parties to have them accurately taken in this suit. It is clear, however, that of the existing capital in February, 1881, a very large portion was attributable to Binney, a small one to Currie, and a still smaller one to Mutrie, if indeed his portion was not to be represented by a minus quantity.

The accounts kept by Mutrie and Currie, the managing partners, appear to follow accurately enough the principle of the partnership articles. They credit to each partner on every 31st of January, down to the year 1883, his share of the declared or estimated profits, and the interest on the capital standing to his credit on the preceding 1st of February. The sum so accumulated was treated as the capital of each partner for the ensuing year, and this their Lordships think was a mode of dealing which, if not compelled by the partnership articles, cannot at any rate be called in question now. As the outgoings were every year much less than the declared profits, the capital of each was thus largely increased. The amount of the capital which each could claim to be paid out of the partnership funds on the 31st of January, 1884,

would be the amount properly credited to him on the 1st of February, 1883, with the year's interest added. The profits of that year never were or could have been made an accretion to the capital, because when the 1st of February came, the partnership had ceased to exist, though in the accounts they have been added up together.

Their Lordships understand that all claims of persons external to the partnership have been satisfied. That being so, it is clear that the surplus assets should be first applied in paying to each partner his claims in respect of capital. The residue will be profits, and will be divisible as such. If the assets will not satisfy the sums found due for capital, there is a loss which must be borne or made good by the partners in the proportions of 40, 35, and 25. And the possibility of such a loss may make it necessary to keep under the control of the Court a sufficient amount of the assets to secure Binney, who has a much larger claim than the others, the benefit of his lien on the assets for contribution. Perhaps the strict course would be to apply for a receiver, but it may be that the parties could agree on some mode of proceeding more convenient to all.

Their Lordships see no reason for reversing or varying the order of the 1st of July, which dismissed Binney's petition for payment of money, or that of the 28th of July, which directed issues of the trial of certain questions of fact. But they ought now to indicate the order which in their opinion the Court should have made on the 1st of June in lieu of the order actually made. It should run as follows:—

(*a.*) Ascertain what amounts ought to be placed to the credit, or to the debit, of each of the three partners in respect of the capital of the partnership business on the 1st of February, 1879.

(*b.*) Declare that each partner is entitled to interest at the rate of 5 per cent. in each year on the capital standing to his credit on the 1st of February in that year.

(*c.*) Declare that, according to the construction of the articles of partnership, whatever profits and interest were attributable to the share of any partner, and were not drawn out by him, are to be credited to him on the 1st

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of February in each year down to the 1st of February, 1883, as part of his capital in the concern.

(*d.*) Ascertain what amount of capital is to be credited to each partner on the 31st of January, 1884, according to the foregoing declarations.

(*e.*) Declare that the surplus assets of the partnership after paying all debts and liabilities, including rents and such costs of this suit as are directed to be paid thereout, ought to be applied in payment of the sums due to each partner in respect of his capital ascertained as aforesaid with interest to the time of payment.

(*f.*) Declare that if the assets of the partnership will not suffice to pay the amounts of capital ascertained as aforesaid, the deficiency is a loss of capital, and is to be borne or made good by the three partners, in the proportion of 40 shares by the plaintiff, 35 by the defendant Mutrie, and 25 by the defendant Currie, and that, subject to this liability and to the claim of any of the partners against the entire assets to answer it, the assets are to be applied rateably in payment of the amounts of capital.

(*g.*) Declare that the residue after payment of capital as aforesaid is divisible as profit into 100 parts, of which 40 are to be paid to the plaintiff, 35 to the defendant Mutrie, and 25 to defendant Currie.

(*h.*) Let all accounts be taken and inquiries made which are necessary for giving effect to the foregoing declarations or orders, but not disturbing any accounts which may have been settled or matters which may have been concluded between the parties, if any such there be.

Their Lordships see no reason to interfere with the decision of the Court as regards costs. They will humbly advise Her Majesty in accordance with the foregoing opinion. With regard to this appeal, they think there has been some error on both sides, and they are not at all sure which party will benefit by the alteration made in the order. The costs should be paid out of the partnership funds.

Solicitors for appellant: *Parker, Garrett, & Parker.*
Solicitors for respondents: *Rooke & Sons.*

[PRIVY COUNCIL.]

BENINGFIELD . . . . . DEFENDANT;

AND

BAXTER . . . . . PLAINTIFF.

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March 9, 10, 11, 12; *July* 14, 15; *Dec.* 7.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Duties of Executor—Sale by Executor to himself voidable—Suit by Legatee—Rights of Creditors.

B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm.

B.'s executor purchased the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee:—

Held, in a suit by the widow against the executor, that such sale was voidable by the rules of equity as recognised by the law of Natal; and that a decree be made for a general administration of B.'s estate declaring that the sale be set aside with certain special directions.

Travis v. *Milne* (9 Hare, 150) approved.

Suit held in this case not to be barred by delay or acceptance of money on the ground either of ratification, acquiescence, or laches.

Decree to be without prejudice to its being shewn on taking the accounts that any creditor was disentitled to the benefit thereof, by estoppel or otherwise.

THIS appeal was twice argued. It was from a decree of the Supreme Court (Nov. 30, 1883), which declared the sales of a certain estate called the Equeefa estate to the appellant in June, 1879, and March, 1880, invalid as against the respondent to the extent of one-third part of such estate and of the rolling stock thereon, and declared the appellant to be trustee for the respondent of such one-third part, and the subsequent profits thereof, subject as in the said judgment was ordered and declared.

The suit was brought on the 1st of March, 1882, against the appellant, as executor testamentary of the late William Black Baxter, and as the trustee or agent of and auctioneer for the respondent, widow of the said William Black Baxter, and sole

* *Present*:—THE LORD CHANCELLOR (LORD HERSCHELL), EARL OF SELBORNE, LORD BLACKBURN, LORD HOBHOUSE, and LORD JUSTICE COTTON.

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heiress and devisee of his estate, to set aside the purchase by the appellant of the Equeefa estate, upon the ground that it was the property of William Black Baxter, and sold by the appellant as auctioneer, and purchased by him while executor and trustee in the administration of the estate of William Black Baxter, and for an account of the estate of William Black Baxter, and of his dealings with and administration of that estate, and in particular an account of his dealings with and administration of the Equeefa estate, and the profits derived by him therefrom, and other incidental relief.

The principal questions raised by the pleadings were:—

(*a.*) Whether the purchase of the Equeefa estate by the appellant was valid?

(*b.*) Whether the respondent confirmed or ratified the sale to the appellant, so as to preclude her from questioning its validity?

(*c.*) Whether the respondent had any right or title to maintain this action, and to obtain the relief prayed for, or any part thereof?

The respondent was the widow of the late William Black Baxter, of Durban, merchant, and the appellant was an auctioneer carrying on business at Durban under the firm of Beningfield & Son.

Robert Black and William Black Baxter carried on business in partnership as general merchants at Durban under the firm of Black, Baxter & Co.

Robert Black, William Black Baxter and Thomas F. Beath, a brother of the respondent, carried on business in partnership as sugar planters and manufacturers at the Equeefa estate, which was the property of the partnership, and in which each of the partners was interested to the extent of one-third.

William Black Baxter after the death of Robert Black in 1875, continued to carry on the business of Black, Baxter & Co., but in consequence of his becoming incapable through illness of managing his affairs, John Robertson, executor dative of Robert Black, and the appellant were appointed curators, subject to their giving security, which was not in fact given, of the estate of William Black Baxter, trading as Black, Baxter & Co., and by deed dated the 12th of April, 1876, they agreed with the

creditors to liquidate the estate under the supervision of a committee of inspection.

William Black Baxter died in 1876, having by his will devised and bequeathed all his property to his wife (the respondent) absolutely. The appellant proved the will and was the sole executor.

On the 2nd of May, 1876, the respondent appointed Thomas Beath and Harry Escombe, of Durban, attorney-at-law, jointly and severally to be her attorneys and attorney, and shortly afterwards left Natal for the United Kingdom.

In July, 1876, John Robertson resigned his appointments as executor dative of the estate of Robert Black and as one of the curators of the estate of Black, Baxter & Co. Harry Escombe was thereupon appointed executor dative of the estate of Robert Black, and the appellant acted as sole curator and liquidator of the estate of Black, Baxter & Co., being at the same time sole executor of William Black Baxter.

Harry Escombe, besides being executor dative of the estate of Robert Black, acted as attorney for Thomas Beath, and was also the solicitor employed by the appellant and the committee of inspection in the liquidation of the estate of Black, Baxter & Co.

The proprietors of the Equeefa estate were heavily indebted to Black, Baxter & Co., and at the time of the death of William Black Baxter the debt was the principal asset of Black, Baxter & Co.

The Equeefa estate was carried on with the approval of the creditors of Black, Baxter & Co. by the appellant and Harry Escombe under the management at first of Thomas Beath, and afterwards of John Robertson, and by means of the profits derived from working the estate and otherwise, the debt owing to the estate of Black, Baxter & Co. was considerably reduced.

On the 26th of June, 1879, the creditors having resolved that the estate should be sold, the appellant and Harry Escombe agreed that at the sale Harry Escombe should bid as far as he liked, and after that the appellant should bid as far as he liked, and if the property was knocked down to either of them Harry Escombe should have the option of taking a half-share, and if he declined the appellant should take the whole.

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On the 28th of June, 1879, the appellant being the auctioneer, the Equeefa estate was put up for sale by public auction. At the sale Harry Escombe and others bid. The appellant knocked down the property to Escombe for £4050, who thereupon signed an agreement to purchase the same for that amount, which, as the estate was sold subject to a bond of £1500, was equivalent to £7550, if the purchaser exercised the option given to him by the conditions of sale of taking the rolling stock for £2000.

Harry Escombe elected to take a half share of the purchase, and the appellant and Harry Escombe continued to work the estate under the management of John Robertson, until in March, 1880, Harry Escombe agreed with the appellant to sell his half to the appellant for a bonus of £900, and Escombe paid part of this sum to the respondent after she had been informed that the appellant had purchased. The appellant then carried on the estate and, as was alleged, derived large profits therefrom.

After the sale letters passed between Harry Escombe and the respondent, John Robertson and the respondent, and the appellant and the respondent, which together with the receipt of the money by the respondent from Escombe, raised the question whether she was precluded from denying the validity of the sale or whether her right to the relief prayed for was barred.

The material portions of the judgment of Connor, C.J. (in which Cadiz and Wragg, JJ., concurred), were as follows :—

"It seems to be impossible on the evidence to doubt that the price obtained at the time was as high as could be expected." And further on—

"Speaking merely for myself I see no sufficient reason for attributing to the defendant any consciousness of illegality or wrong in the part he took in the transactions which I have been detailing. He seems to have acted throughout without any concealment of facts within his knowledge as to the prospects of the estate.

"It will be seen from what I shall proceed to say that it is not to me at all clear that Mr. Escombe's original purchase of half of the estate, even if regarded as being for himself, was not, if taken by itself, and irrespectively of his prior agreement with the defendant, valid in our law.

"I now come to the consideration of that law, and it would be

a mistake, I think, to regard it on the subject involved in this action as identical with English law, though, as I have arrived at the same result as was contended for ought to be arrived at under English law, the distinction may not be of much practical importance.

"The English law as to the invalidity of purchases by persons holding a fiduciary position towards the property was, I presume, in its origin taken over by the Court of Chancery from the Roman law, and it seems, I think, clear from Lord St. Leonards' (Vendor and Purchaser, c. 20, s. 2) reference to a course of decisions on the subject that the rule in England had been becoming strict since its first introduction, and, judging from a later edition of Erskine's Institutes (Notes to, 1, 7, 19), a somewhat similar change occurred in Scotland, and so also in France (Poth. Contr. de Vente, s. 13; Cod. Napoléon, art. 1596).

"In all these countries the exception as to public auctions, which is recognised in our own law, was had regard to. The Roman law, Dig. 18, 1, 34 (7), while forbidding purchases by governors in their own provinces, a rule said to be long obsolete, laid down as to general fiduciary relations as follows: 'A guardian cannot buy the property of his ward. The same rule is to be extended to like cases, that is to curators, attorneys, and those who conduct others' affairs.' Again (Dig. 18, 1, 46), 'It is not allowed any one from the office which he performs to buy anything either through himself or another. If he does he not only loses the property, but is liable fourfold.'

"But this penalty is said to be obsolete. Such was the general rule. We now come to the exceptions from it.

"Pothier introduces them thus, 'Nevertheless, there being a public auction, a guardian and any other administrator is not prohibited buying of the goods whereof he has the administration. Concerning such an auction take what Diocletian and Maximilian decree.'

"And he then gives two laws of the Code (4, 38, 5, and 10, 3, 7). He says that this latter lex, though absent from the editio vulgata, has been restored. The former of these laws is to the effect that a guardian is not prohibited from acquiring openly and bonâ fide any property of his ward which is properly saleable.

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Pothier continues: 'But even without an auction, if a guardian have a co-guardian, and he, by authority of that co-guardian, buys the ward's property bonâ fide, the purchase will be valid;' and he refers to Dig. 26, 8; Poth. Pand. 26, 8, 13, 14; where the goodness of the purchase is in such cases made to depend on its bona fides.

"And so Grœnewegen (ad Cod. 4, 38, 5) in reference to that law of the Code, the effect of which I have already mentioned, says that that law is also the law of Holland, the ward retaining an action if there were dolus malus.

"Wissenbach, in treating of the law of the Codes to which I have already referred (Cod. 4, 38, 5), says, 'that representing an imaginary object or that it seems contrary to' (Dig. 18, 1, 34 (7), which law I have already stated, but replies, that a guardian cannot, as guardian, that is, from himself or from the ward as authorized by him, purchase the property of the ward (citing Dig. 26, 8, 5 (2), and 18, 1, 34 (7), but that the guardian can buy as a stranger; if for instance the ward's property be openly, bonâ fide, and by public auction sold, sub hastâ, the guardian is allowed to bid.

"He cites Dig. 26, 8, 5 (6), and another passage, in neither of which laws is there any express reference to sub hastâ. These words seem to refer to the practice at public auctions of erecting a spear at the entrance for notoriety or to shew the uprightness of the transaction. Such auctions, however, seem generally to have had some official character. Wissenbach also cites Dig. 26, 7, 56 (Poth. Pand. 26, 8, 15), where it was declared that when the ward's property had been sold privately, and some of the purchasers failed to pay, the guardian might keep the property at the same price.

"The question where the sale was public seems to have been this—Was there bona fides in the purchase?

"It is, however, further laid down (Poth. Pand. 26, 8, 14, citing Dig. 26, 8, 5 (3, 4), and 27, 9, 9), that the guardian's buying through an interposed person is illegal. Digest, 26, 8, 5 (3), is as follows: "But if the guardian has, through an interposed person bought the ward's property, then in that case the purchase is of no effect, because he does not seem to have acted bonâ fide."

And this distinction appears to be adopted generally by our jurists.

"And though perhaps there may be a question whether some jurist did not think that still fraud was to be shewn in order to defeat the sale, yet all seemed to require that the guardian's purchase should be made openly (palam). (Grœnwn. ad Cod. 4, 38, 5; Wis. ib.)

"The purchase has to be not only bonâ fide but palam. There is in the case before us the additional circumstance that the defendant was himself the auctioneer, and, therefore, in substance adjudged the property, at least as to half, to himself, contrary to the general rule prohibiting the being a judge in one's own cause. . . .

"Whether or not, according to the principles of our law, the sale to Mr. H. Escombe in June, 1879, was valid as against the Plaintiff has not, I think, now to be decided, because the agreemant prior to the sale between the defendant and Mr. Escombe for their joint purchase appears to me to prevent the sale to Escombe, and, therefore, by him to the defendant in 1880, being quoad the latter of greater validity than the original purchase by the defendant himself, and to prevent the sale in 1880 being valid as an independent incident to Mr. Escombe's purchase in June, 1879 (Dig. 26, 8, 17; Voet, 18, 1, 12).

"So far, therefore, as the Plaintiff had, before the sale in June, 1879, the title to the Equeefa estate, the purchase by the defendant appears to me to be one which cannot be upheld as against the Plaintiff.

"There remain questions with reference to plaintiff's title to or in the estate, and her acts by way of ratification. Her title to her late husband's one third of the Equeefa estate, which was originally the same as his, and therefore the present question as to this one third is, in my view of the case, simply this,—Has she ratified or acquiesced in the sale to the defendant so as to prevent her from now complaining of it? And though the negative may not be quite clear, still, when I put together the distance the plaintiff lives from this colony, her early complaining to the defendant, the expectations held out to her that the purchase would, in some way or other, be for her, and her want of means, I

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do not think that ratification by her is at all sufficiently clearly shewn to bind her." The Chief Justice accordingly held that the Plaintiff's right as to her one-third had not been forfeited by her.

The case first came on for argument in March.*

Sir *Horace Davey*, S.G., and *Folkard*, for the appellant, contended that the judgment should be reversed, and that the appellant should be absolved from the instance. The respondent had no such interest in the Equeefa estate as would entitle her to maintain her suit, or which would suffice to create any fiduciary relationship between her and the appellant with reference to the sale complained of. By the partnership agreement the Equeefa estate became partnership estate. It did not result from that that each partner was entitled to a third of it, or was interested in it to the extent of a third. All that resulted was that each partner was entitled to have the estate treated as a partnership asset, liable to the partnership debts. Besides prior to the death of Baxter, the Equeefa estate became vested in the appellant as an asset of the insolvent firm of Black, Baxter & Co. for realization by the appellant as liquidator of that firm's estate, and as such liquidator he was trustee only for the creditors and not for the respondent. The sale was for the benefit of the creditors, and the respondent had no interest in it: *Norden* v. *Still* (1); *Dibb's Case* (2). Partnership property is held in trust for being applied to partnership purposes—which in this case was only for the purpose of paying partnership debts, there being no surplus in which alone the respondent had an interest. If the contract were rescinded, and the parties restored to the status quo, the creditors alone would benefit, and they have acquiesced, and have not sued. The plaintiff was not interested in the status quo. [*Cohen* referred to *Pointon* v. *Pointon* (3).] In that case the estate itself was part of the testator's assets; whereas

(1) 2 Menzies, part 2, p. 38. (2) Unreported.
(3) Law Rep. 12 Eq. 547.

* There were present at the first hearing:—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

here the third share of the Equeefa estate was never part of Baxter's assets. The fundamental fallacy of the judgments below is that they give the respondent something which she had not at the time of the sale, and never could have had. They have treated as an asset of Baxter's estate that which was not an asset till the creditors had been paid in full.

Reference, as to the right to maintain this suit, was made to *Clark* v. *Swaile* (1); *Dover* v. *Buck* (2); Burge's Colonial Law, vol. ii., p. 463. The plaintiff should have a substantial interest and not an ultimate right, which, as here, may very probably be nil.

The joint purchase at the auction, and the subsequent sale by one purchaser of his share to the other, were valid both in law and equity. They were palam and bonâ fide transactions, and it was not proved that the appellant did not do his best to obtain the best price.

As to laches, and implied ratification of the sale by the respondent, the evidence shews that she was informed of the circumstances, and afterwards accepted money, while she did not sue till 1882: *Senhouse* v. *Christian*, in *Norway* v. *Rowe* (3); *Hart* v. *Clarke* (4); *Prendergast* v. *Turton* (5); *Wentworth* v. *Lloyd* (6).

Cohen, Q.C., and *Wood Hill*, for the respondent, contended that the judgment appealed from was right. The appellant was curator and liquidator of the estate of Black, Baxter & Co., he was executor of William Black Baxter, and he was auctioneer employed to sell. In all these capacities he was trustee and agent to sell. He could not therefore buy either in whole or in part, either separately or jointly with Harry Escombe. Then, again, Escombe was executor dative of Robert Black, and the solicitor employed in the sale. Consequently he could not lawfully buy either separately or jointly with the appellant. Their joint agreement so to do was in breach of their duties to the vendors and invalidated their purchase. As to the respondent's right to sue, she had an equitable interest in one-third of the

(1) 2 Eden. 134.
(2) 5 Giff. 57.
(3) 19 Ves. 158.
(4) 19 Beav. 356.
(5) 1 Y. & C. 98.
(6) 32 Beav. 474; affirmed by the House of Lords.

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estate, subject to the payment of debts, which might be insufficient to absorb the whole estate, released or barred. The appellant was therefore in a fiduciary position towards her, he owed her a duty, which was to obtain the best price for the estate, and she was entitled to the aid of a Court of Equity to have that duty discharged, and she was sole judge as to whether it was worth her while to sue, which is practically all that the argument for the appellant denied. Reference was made to *Lake* v. *Craddock* (1); *Lewis* v. *Hillman* (2); *Hamilton* v. *Wright* (3); while with regard to *Clark* v. *Swaile* (4), cited on the other side, it was pointed out that the reporter gives in a note thirteen cases overruling it. It was contended that under no circumstances can a trustee sell to himself, and that any one who is interested, however remotely, in the proceeds of the sale, or in the property sold, can sue to set it aside. With regard to laches, the respondent, considering the distance at which she lived and all the circumstances, was not barred by delay: *In re Cross, Harston* v. *Tenison* (5). As to confirmation and acquiescence, there must be complete knowledge of the transaction ratified or acquiesced in: *Fox* v. *Macreth* (6); *Cockerell* v. *Cholmeley* (7); *Savory* v. *King* (8). The transaction was invalid by Roman-Dutch Law. It was not palam et in auctione publicâ. Reference was made to Pothier, Contrat de Vente, part 1, sect. 2, par. 13; Codex book iv., tit. 38, par. 5; Digest, book 18, tit. 1, sect. 34; sub-sect. 7; book 26, tit. 8, sect. 5, sub-sect. 6; book v. tit. 1, par. 10; Codex, book 10, tit. 3, sect. 7; Voet, book 18, tit. 1, par. 9; *Bennett* v. *Colley* (9); *March* v. *Russell* (10).

Folkard, replied.

In July the case was re-argued.

Sir *H. Davey*, S.G., and *Folkard*, for the appellant.

Wood Hill, for the respondent.

(1) 1 W. & T. 200.
(2) 3 H. L. C. 607.
(3) 9 Cl. & F. 111.
(4) 3 Eden. 134.
(5) 20 Ch. D. 109.
(6) 1 W. & T. 174.
(7) 1 Russ. & My. 424.
(8) 5 H. L. C. 627.
(9) 2 M. & K. 225.
(10) 3 My. & Cr. 31.

Dec. 7. The judgment of their Lordships was delivered by

THE EARL OF SELBORNE:—

Their Lordships, while they are of opinion that the respondent (plaintiff below) was entitled to a decree in her suit, think it impossible that the judgment appealed from should stand unaltered.

The learned judges in the Court below appear to have considered that the plaintiff, as sole legatee under her late husband's will, was entitled specifically to one third part of the Equeefa estate; and that the necessary effect of setting aside the sale impeached in this suit would be to remit her to what they so regarded as her original right. From this point of view, it was unnecessary for them to enter (and they did not enter) into any question as to the other two-thirds of the Equeefa estate, or as to the rights of creditors, either of the partnership of Black, Baxter, & Beath, or of the Durban partnership of Black & Baxter.

But the Equeefa estate was the joint partnership property of the firm of Black, Baxter & Beath, of which Beath was the surviving partner. The provisions of the partnership deed, under which the surviving partner might (if the firm had been solvent and the shares of the partners worth anything) have acquired the whole interest by paying off the representatives of the deceased partners, may be disregarded, because they were not and could not be acted upon, the firm being insolvent. Under these circumstances, the only interest which the representatives of the deceased partners (Black & Baxter) or either of them, had in the Equeefa estate, or in any other assets of that firm, was to have them applied towards the liquidation of the indebtedness of the firm in a due course of administration. Even if the plaintiff had been her deceased husband's legal personal representative, she would not have been entitled, in that character or otherwise, to an undivided one-third, or any other specific share, of the Equeefa estate. That office was held, not by the plaintiff, but by the appellant here, who was the defendant below. The plaintiff, as universal legatee under her husband's will, was entitled to nothing except the ultimate beneficial interest in such surplus (if any) as might remain of his estate after payment of all his

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debts, including the debts of the firms in which he was a partner.

The beneficial interest of the plaintiff's husband in the Equeefa partnership was necessarily less than nothing, because that partnership was insolvent. But the Durban firm, in which he was also a partner, and the survivor of the two, was a creditor, and (as far as their Lordships can judge from the materials before them), the sole creditor of the Equeefa partnership; it having been agreed that the Durban firm should find all the funds necessary for carrying it on, and should have the disposal or sale of all the produce of the Equeefa estate. The debt so due to the Durban firm was very large; and upon its payment, by realization of the Equeefa estate and the other assets of the Equeefa firm, the ultimate solvency of the Durban firm itself depended. If the debts of the Durban firm were paid in full, there might be something coming to the plaintiff as her husband's legatee, but not otherwise. A large amount of capital had been sunk in the Equeefa estate; and, if that estate sold well, there might perhaps be a surplus.

Under these circumstances, it was the duty of the defendant, as Baxter's executor, to take the proper measures for getting in the assets, and liquidating the debts, of both the firms in which his testator had been a partner; and it was the plaintiff's right (her only right) to have that duty properly performed by him, so as to realize as much as possible for her husband's estate: and, in case of there being any ultimate residue, to have that residue paid over to her. Her complaint in this suit is (in effect) that, instead of properly performing that duty, he dealt with the Equeefa estate as if he had been a stranger, and assumed to purchase it for his own benefit, upon terms which left nothing to her as legatee; and the substantial object of this suit is to set aside that purchase.

The first question which arises is, whether the plaintiff, not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger)

could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty: *Travis* v *Milne* (1).

Has the plaintiff then sued in proper form? Their Lordships think so; although, in those conclusions of her writ of summons and declaration which seek to have the Equeefa estate, and all its proceeds, transferred to or declared to be held in trust for herself, she has asked what she is not entitled to. Her prayer is wide enough to cover whatever she is really entitled to. She asks for a general account of her late husband's estate; for a particular account of the defendant's dealings with the Equeefa estate; that the defendant's purchase for his own benefit may be set aside; that the Equeefa estate may be sold; "and, generally, for such other relief as to the Court shall seem fit."

Upon the merits, their Lordships agree, without hesitation, in the opinion of the Court below, that the sale was either voidable or void in equity. The doctrines and rules of equity recognised by the law of Natal do not appear to differ on this point from those of our own Courts. This sale (if it can be called at all by that name) was made in the first instance by the defendant and Harry Escombe—both of them acting and selling in more than one fiduciary capacity—to themselves; and what (as between them) was regarded as Escombe's share of the bargain was afterwards transferred by him to the defendant, Baxter's executor. Harry Escombe was the legal personal representative of Black, and also held a general power of attorney from the plaintiff, and had acted as solicitor in the affairs of the partnership estates. On this point no more need be said. Unless the plaintiff was estopped by some personal exception, she had a clear right to a decree for the usual accounts of her husband's estate, and to a declaration that, in respect of the transfer of the Equeefa estate to him, (in which Thomas Beath, by his attorney, had concurred,) the defendant was accountable for that estate and his dealings with it to all parties interested in its due and proper administration, according to their respective rights and interests; with all inquiries, accounts, and directions properly consequential thereon. The benefit of such a decree must necessarily, in their Lordships'

(1) 9 Hare, 150.

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opinion, enure first to the joint creditors of the Durban firm, if, as they assume, the Equeefa firm had no other creditor; though, on that point, inquiry ought to be directed by the decree. If the result is to realize more for the Durban firm than has already been applied in payment of dividends to its creditors, every creditor of that firm who has neither been paid in full nor has released the residue of his debt must be entitled to come in against the fund so made available. Those creditors have not, in their Lordships' opinion, so far as appears by the evidence now before them, done anything which, by estoppel or otherwise, can be held equivalent to a release of any part of their claims against such a fund. There was no bankruptcy, no legal liquidation, no legal representation of creditors. Some of those creditors acted as a committee for the rest; they knew that the Equeefa estate was put up for sale by auction; so much as that they authorized; and, out of the £7500 which Beningfield and Harry Escombe undertook to pay, the creditors received dividends. But it would not be safe to infer, from anything that appears in the evidence, that those who were not on the committee knew all the material facts; those who were on the committee probably did know, more or less; but they may not have known that the purchase was impeachable in equity; and, if they did, the most that can be inferred is, that they did not think it worth their while to incur the risk and expense of litigation. This (and the acceptance of the dividends which were offered them) cannot, in their Lordships' opinion, estop them from claiming what otherwise might be their due (if the purchase is now set aside at the plaintiff's suit), in priority to the plaintiff, who is a mere legatee of their debtors. Their debts have been, of course, reduced by the dividends which they have received; and the defendant will have credit in the account to be taken for the amount of all those dividends, as payments properly made out of the joint estate. It is scarcely necessary to add, that the opinion which their Lordships have expressed on this subject is entirely without prejudice to any question which may arise, on taking the accounts, out of any new or further evidence which may then be before the Court, as to the rights or position of any particular creditors or creditor.

The question whether the plaintiff's right of suit is barred by her delay after she knew that the defendant had purchased as for his own benefit, and had been advised that the purchase was impeachable, coupled with her acceptance of the sum paid to her by Harry Escombe, is, perhaps, more difficult than any other in the case; but their Lordships' opinion on that point is the same as that of the Court below. Considering the plaintiff's position and circumstances, and the expectations which she had been led to form that she would have, or would participate in, the benefit of any such purchase if it should prove beneficial,—as to which her statements receive corroboration, not only from Harry Escombe's letters and evidence, but also from the evidence of the defendant himself,—their Lordships do not think that either her delay or her acceptance of the money offered her can bar her suit, on the ground of lâches, or of acquiescence or ratification. But, in the event of there being any surplus coming to her after taking the accounts directed by the decree, their Lordships think that she must give credit to the defendant, as against that surplus, for the money which she received from Escombe.

Their Lordships will therefore humbly advise Her Majesty to discharge the judgment appealed from, and to remit this case to the Court below, with declarations to the following effect:—

1. That a decree be made for a general administration and account as against the defendant Beningfield, the executor of William Black Baxter, deceased, of William Black Baxter's estate, including the payment of all debts now remaining due from him, either separately or jointly with Robert Black, deceased, or with Robert Black, deceased, and Thomas Beath, in a due course of administration.

2. That it be declared that the purchase of the Equeefa estate in the pleadings mentioned by the defendant Beningfield and Harry Escombe respectively was voidable in equity and ought to be set aside in manner hereinafter directed, and that any moneys arising from the re-sale of the Equeefa estate, if made under the directions herein contained, or ordered to be made good by the defendant Beningfield, ought to be applied for the payment (in the first place) of the joint debt due from the partnership firm of Black, Baxter, & Beath to the partnership of Robert Black and

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William Black Baxter, trading under the firm of Black, Baxter & Co., and of all other joint debts (if any such there were) due from the said firm of Black, Baxter, & Beath; and subject thereto, and in the event of there being any ultimate surplus of the moneys above mentioned, for the partners in the said last-mentioned firm, or the persons now entitled in their right, respectively, according to their respective interests therein.

3. That it be further declared, that such amount as may have been or may become applicable to or towards the payment of the joint debt, due from the said firm of Black, Baxter & Beath to the said firm of Black, Baxter & Co., ought to be applied by the defendant, as executor of the said William Black Baxter, towards the payment (in the first place) of all such joint debts and liabilities of the said firm of Black, Baxter & Co. as now remain due and unpaid, and as to the residue or surplus (if any) which may remain after payment of all such debts and liabilities, for the benefit of the separate estate of the said William Black Baxter and of the legal personal representative or other person or persons now entitled in right of the said Robert Black respectively, according to their respective interests therein.

4. That all such accounts be taken, inquiries made, and directions given, as to the debts of the aforesaid firms, and as to the proceeds and produce of the said Equeefa estate, and the dealings of the defendant therewith, as may be necessary or proper to give effect to the declarations aforesaid, or otherwise for the due administration of the said Equeefa estate, and of the proceeds and produce thereof; and that, in taking such accounts, all just allowances be made to the defendant; and in particular that an account be taken of the receipts and payments of the defendant Beningfield in respect of the Equeefa estate, and that it be ascertained what is due to or from him on such account, and declare that in taking this account the defendant Beningfield is to have credit for the sums paid by him, or by him and Harry Escombe, as the purchase-money of the estate (but not including anything paid by the defendant to Harry Escombe for the purchase of his interest), and for the two sums of £1000 each paid to Robertson and Turton, if and so far as such may have been payable by the defendant according to the terms of the two

letters of the 28th of August, 1879; and that the said Thomas Beath and the legal personal representative of the said Robert Black do respectively have notice of the decree and be at liberty to attend the taking of such accounts and other proceedings under the decree as they are respectively interested in, and to take part therein, in the same manner as if they had been parties to this suit.

5. That if on taking the said accounts nothing shall be found due to the defendant Beningfield, the said Equeefa estate, and all the rolling stock, crops, and produce now belonging thereto, be ordered to be sold under the direction of the Court, at such time and in such manner, and with such reserved prices or price (if any) as to the Court shall seem fit; but that if on taking the accounts hereinbefore directed with reference to the purchase and proceeds of the Equeefa estate a balance be found due to the defendant Beningfield, the Equeefa estate be put up for sale at a reserved price not less than the amount of such balance, and that if it does not realize that sum the estate be retained by the defendant Beningfield.

6. That the plaintiff be ordered, if it shall appear on taking the said accounts that anything is coming to her from the estate of the said William Black Baxter, to give credit to the defendant, as against such amount, for the sum received by her from Harry Escombe out of the money paid to Harry Escombe by the defendant, as in the pleadings and evidence appears.

7. That the decree is to be without prejudice to any question between the defendant and any person not a party to the suit.

With regard to costs, their Lordships think that the costs in the Court below ought to be paid by the defendant; and that the taxed costs of this appeal, of both parties, should be costs in the cause, and should be provided for accordingly whenever the costs of the cause are finally disposed of by the Court below.

Solicitors for appellant: *H. Kimber, Elliot & Co.*
Solicitors for respondent: *Dawes & Son.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1887 Feb. 14.

BURNS . . . . . APPELLANT;

AND

BRYAN or MARTIN . . . . . RESPONDENT.

Lease—Joint Tenants—Covenant to pay Rent—Liability of Executors of deceased Tenant during Sole Tenancy of Survivor.

A mineral lease for thirty-one years was granted to L. and M., "and the survivor of them, but expressly excluding assigns and sub-tenants, whether legal or conventional." By the lease L. and M. bound themselves and their respective heirs, executors and successors, all conjunctly and severally renouncing the benefit of discussion, to pay the rent. The lease also provided that if L. or M. became bankrupt it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bankrupt, and M. died, but the lessor never exercised his option to determine the lease:—

Held, reversing the decision of the Court of Session, that by the terms of the clause of obligation the lessees were conjunctly and severally liable for rent irrespective of their interest, and that after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease.

Dundee Police Commissioners v. *Straton* (11 Court Sess. Cas. 4th Series, 586) approved.

APPEAL from a judgment of the Court of Session, Scotland (1).

The facts, so far as material, are given in the Law Peers' opinions.

On appeal,

1886. July 30. Aug. 2. *Rigby*, Q.C., and *J. P. B. Robertson*, Q.C., for the appellant:—

The view taken by the Court of Session (1), that the clause in question only binds each tenant and his representatives for the rent during the subsistence of his own right and occupation, is not reconcilable with the express terms of the clause. No doubt in *Skene* v. *Greenhill* (2) it was decided that a covenant binding

(1) 12 Court Sess. Cas. 4th Series, 1343.

(2) 4 Court Sess. Cas. 1st Series, 26.

the lessee, his heirs, executors and successors, did not bind the lessee's representatives, after the lessee had assigned the land, with the lessor's consent, to a stranger. But here the words "all conjunctly and severally" remove the difficulty in *Skene* v. *Greenhill* (1), and place an obligation singuli in solidum on every one of those mentioned in the clause of obligation. In *King's College, Aberdeen* v. *Lady Hay* (2), A. by a personal bond bound himself, his heirs, executors and successors, for all time to make payment of the annual feu duty. This House held, that although A. had ceased to possess the land, his general representatives were liable: see also *Millar* v. *Small* (3). In *Dundee Police Commissioners* v. *Straton* (4) A. bound himself and his heirs, executors and successors whomsoever, conjunctly and severally, to pay the feu duty. There also, although A. had sold the land, it was held that he and his representatives were liable in perpetuity. The Lord President said: "A conjunct and several obligation is one which binds a plurality of persons. All are bound to fulfil the same obligation, and each is bound to fulfil the whole of it; and it is in the option of the creditor to enforce the whole obligation against any one of those taken bound." Again the expression "all" is inconsistent with the view that the words "conjunctly and severally" apply only to each group of heirs, &c.

The Lord Advocate (*Balfour*, Q.C.), and *Rhind*, for the respondent:—

No doubt the respondent is liable for the rent due up to the date of Martin's death, and therefore £30 was paid into Court. But on Martin's death, by the very language of the clause of obligation, the whole estate in the lease passed entirely to Logan; and the liability of Martin's representatives came to an end. It is settled in the law of Scotland, since *Greenhill's Case* (1); see also 1 Bell, 73, that where a lessee binds himself, his heirs, executors and successors, for all the time of the lease, he nor his successors do not continue liable for the rent after an assignee is expressly received by the landlord. The clause here

(1) 4 Court Sess. Cas. 1st Series, 26.

(2) 1 Macqueen, 526; 14 Court Sess. Cas. 2nd Series, 675.

(3) 1 Macqueen, 345; 11 Court Sess. Cas. 2nd Series, 495.

(4) 11 Court Sess. Cas. 4th Series, 586.

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is not an exceptional one: see 1 Juridical Styles (5th ed.), 589, 592; 2 Hunter's Landlord and Tenant (4th ed.), 649. The true construction of the word "respective" before heirs, &c., must be that it is a word of distribution. It splits the group of heirs, so that each tenant binds the group of persons he can bind, and then come the words "all conjunctly and severally" meaning all of each group or class of heirs, &c., of each individual lessee. That is, as it turns out, Martin being dead and Logan surviving, all Logan's heirs, &c. Again, the two tenants, Logan and Martin, were taken without the power of assignation, and therefore were not in the same position, as if they could assign to any one.

[LORD BLACKBURN:—If a wealthy, but elderly ironmaster choses to take a lease of a mine with a younger but poorer man, surely the elder could bind his representatives.]

In such a case a cautioner ought to be taken; but the obligation undertaken here is not that of a cautioner. *Dundee Police Commissioners* v. *Straton* (1) was not correctly decided, but at any rate it was a case of a feu, which very materially differs from the case of a lease.

It is not admitted that the words are open to two constructions, but if they are, then the whole privilege of possession is with Logan, and the English cases decide that if the words of the obligation are ambiguous they will be construed to be joint or several according to the interest: *Sorsbie* v. *Park* (2); *Bradburne* v. *Botfield* (3); *Keightley* v. *Watson* (4).

J. P. B. Robertson, Q.C., in reply.

Time was taken to consider judgment.

LORD HERSCHELL (5):—

My Lords, during the argument of this case there were present my Lord Blackburn, my noble and learned friend on my left (Lord Watson), and myself. Lord Blackburn is unable to be

(1) 11 Court Sess. Cas. 4th Series, 586.
(2) 12 M. & W. at p. 157.
(3) 14 M. & W. at p. 572.
(4) 18 L. J. (Ex.) at p. 341.

(5) LORDS BRAMWELL and FITZGERALD were also present; but not having heard the argument delivered no opinion.

present and to take part on this occasion; and, accordingly, an intimation was given to the parties that if they desired it the case might be re-argued, although all those who heard the argument agreed as to the judgment which ought to be delivered. The parties have expressed no such desire, but have prayed for the judgment of your Lordships' House, and, under these circumstances, there seems to be no difficulty in its being pronounced.

In this case the respondent was sued as executrix of her deceased husband, Hugh Martin, for two half years' fixed rent under a mineral lease, granted by the appellant to William Logan and Hugh Martin for thirty-one years from Martinmas, 1882.

The sole question, as it appears to me, is whether, upon the true construction of the covenant for payment of rent contained in the lease, the legal representative of a deceased lessee became liable for the rent accruing after his death.

The lease was granted to William Logan and Hugh Martin "and the survivor of them, but expressly excluding assigns and sub-tenants, whether legal or conventional." The covenant is in these terms: "The said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, the sum of £200 sterling yearly, for each of the first five years of this lease, and the sum of £250 sterling yearly thereafter during the currency of this lease in name of fixed rent or tack duty . . . for the privilege of working and disposing of the fireclay in manner herein mentioned;" or, in the option of the lessor, of a royalty on the output of the fireclay, instead of the fixed rent.

There can be no doubt, in view of the terms of the grant, that the interest of Hugh Martin under the lease ceased on his death, and that the entire interest then vested in William Logan as the survivor.

It has been contended by the respondents that on the true construction of the covenant all liability on the part of Hugh Martin or his representatives terminated at the date of his death.

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The majority of the Judges of the Second Division of the Court of Session were of opinion that this contention was well-founded, though they rested their judgment on another ground, to which I shall presently refer.

I confess that I approach the construction of the covenant with every inclination to take the same view. I am fully alive to the force of the argument that it is not to be expected that the representatives of the deceased lessee should be made equally liable with the survivor to the payment of the rent, seeing that the entire benefit passes to him.

But, after all, the case must be determined by a careful scrutiny of the language used, and by giving to that language its natural grammatical meaning. It is not an impossible or inconceivable bargain that each of the lessees should agree that his estate should remain liable for the rent notwithstanding that the lease enured to the benefit of the survivor. If the covenant had been fairly open to either construction, I should certainly have yielded to the argument of the respondent; but, upon the best consideration I can give to the matter, I cannot avoid the conclusion that the plain natural meaning of the words of the covenant is, that the representatives of Hugh Martin became liable for payment of the rent after his decease. It is unnecessary for me to state in detail the considerations which have led me to this conclusion, as I have had the advantage of perusing the opinion of my noble and learned friend (Lord Watson), and I concur entirely with the reasons he has expressed. I think that, ignorant as we must necessarily be of the surrounding circumstances which might have explained the bargain and shewn that it was reasonable, we should be quite as likely to do injustice as justice if we were to depart from the natural construction of the language employed by the parties, because we thought the result unreasonable, and such as was probably not intended. The only safe rule in cases like the present is a strict adherence to the view that the parties intended that which is the natural meaning of the language they have used. As this case involves a question of Scotch conveyancing, it is a great satisfaction to me to find that my noble and learned friend (Lord Watson), who is so well versed in such matters, and also two out of the four learned Judges who have

had to consider the case, have arrived at the same conclusion to which I have felt myself compelled.

Placing the construction which I have expressed upon the covenant, the whole case is, in my judgment, disposed of in favour of the appellant.

The Lord Justice Clerk and Lord Young held that the appellant had put himself out of Court by the allegations contained in his third condescendence. That condescendence states that the estates of William Logan were, on or about the 19th of October, 1883, sequestered under the Bankruptcy Statutes, and thereupon the tenant's rights and liabilities in and under the said lease devolved wholly on the said Hugh Martin, who, accordingly, made payment to the pursuer of the fixed half-year's rent due in terms thereof at the term of Martinmas, 1883, and worked and manufactured the said fireclay, and carried on the said business as alone interested therein, and in the subjects let by the said lease.

To this condescendence the answer was as follows:—"Admitted that W. Logan's estate was sequestrated on the 19th of October, 1883. Admitted that the Martinmas, 1883, rent was paid by Mr. Martin. Quoad ultra denied. The clause of the lease regarding bankruptcy is in these terms: "It is hereby specially provided and declared, that if the second parties or either of them, or their aforesaids, shall become bankrupt, or if sequestration shall be awarded against them, or either of them . . . this lease shall, in the option of the first party or his foresaids, become ipso facto void and null."

Upon the statement of the pursuer in his third condescendence, that on Logan's bankruptcy and sequestration the tenants' rights and liabilities under the lease devolved wholly on Hugh Martin. Lord Young observes that this necessarily implies that the pursuer, as landlord, deprived Logan and the trustee in his bankruptcy of all rights, and freed them from all liabilities under the lease, which he was entitled to do by reason of the bankruptcy and sequestration. He then proceeds: "But if Logan and his trustees were thus deprived of all rights, and freed of all liabilities as from the 19th of October, 1883, Logan could not by his survivance become tenant on Martin's death three months after

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—in January, 1884. It follows clearly and, indeed, necessarily, that the defender cannot be liable or bound for rents due by Logan since Martin's death."

My Lords, I am quite unable to concur in this reasoning. Even if the allegations of the condescendence had been admitted by the defender, I do not think that the conclusion arrived at by Lord Young would have followed. The allegation that on Logan's bankruptcy the tenant's rights and liabilities under the lease devolved on Martin, I construe, as stating the legal effect of the sequestration, and not as alleging any matter of fact; and when the terms of the lease are looked at, it is clear that the allegation was not well founded. The only effect of the sequestration was to give an option to the lessor to make the lease void and null. It is clear that he did not avail himself of this option, and it is not alleged that he did. And I cannot see how an erroneous allegation of this description can alter the rights either of Logan or the pursuer. But the defender denied the allegation, and no doubt rightly denied it. Under these circumstances I am, with deference to the learned Judges who have taken a different view, at a loss to understand how the pursuer, if otherwise entitled to recover, could be deprived of that right by reason of an erroneous allegation, denied by the defender, the issue on which would, therefore, have to be found in favour of the defender, but if so found would establish no bar to the pursuer's claim.

I think that the judgment of the Court below should be reversed, and that the interlocutor of the Lord Ordinary of the 12th of March, 1885, should be restored, and that the respondents should pay the costs in the Court below and costs of this appeal, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, by a lease executed in February, 1883, the appellant let the seams of fireclay in part of his estate of Cumbernauld, for thirty-one years from Martinmas, 1882, to "William Logan and Hugh Martin and the survivor of them," assignees and subtenants, whether legal or conventional, and also managers, being expressly excluded, except with the written consent of the lessor.

The tenants are empowered to renounce the lease upon giving intimation by registered letter to the lessor, six months previous to the term of Martinmas, 1887, or previous to any term of Martinmas thereafter at which any subsequent consecutive period of five years shall expire. In the event of the tenants, or either of them, becoming bankrupt, or of their estates being sequestrated, it is provided that the lease shall, in the option of the lessor, become void and null.

William Logan's estates were sequestrated on the 19th of October, 1883; and Hugh Martin died on the 5th of January, 1884. The half-year's fixed rent of £100 falling due at Martinmas, 1883, was paid by Martin. The respondent is the sole accepting trustee and executrix under Hugh Martin's deed of settlement; and the present action was brought against her, in that character, by the appellant, for payment of two half-year's rents which became due at the terms of Whitsunday and Martinmas, 1884.

It was assumed in the arguments addressed to your Lordships, and it does not appear to me to admit of doubt, that, by the conception of the lease, Logan and Martin are made joint tenants during their joint lives; that, on the predecease of one of them, the survivor becomes the sole tenant; and that, on the survivor's decease, the right of tenancy devolves upon his heir of line. Accordingly William Logan, on the death of Martin, became and now is sole tenant under the lease, unless his right has been in some way determined. The appellant's case is that Martin's heirs and executors, although they have no interest as tenants, remain liable for rent during the currency of the lease; whereas the respondent maintains that by the terms of the lease the liability of the predeceaser's representatives is limited to rents which accrued during his lifetime.

The Lord Ordinary (Trayner) gave the appellant decree in terms of the conclusions of his summons; but the Second Division of the Court recalled his interlocutor, ordained the respondent to pay £30 2*s.* 8*d.* sterling, being the proportion of fixed rent for the period between Martinmas 1883 and the date of Hugh Martin's death, and quoad ultra, assoilzied. Lord Rutherfurd Clark dissented from the judgment. The Lord Justice Clerk

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and Lord Young, who constituted the majority of the Court, indicated their opinion that the heirs and executors of Hugh Martin were not liable for rents becoming due after his death; but they rested their decision upon the ground that the appellant had judicially admitted that the lease came to an end by the sequestration of Logan, and consequently that, after the death of Martin, there was no longer any tenant liable for rent.

The averments which the learned judges treated as a judicial admission to the foregoing effect are in these terms: "Thereupon (i.e. upon the sequestration of William Logan's estates) the tenant's rights and liabilities devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half-year's rent due in terms thereof at the term of Martinmas, 1883, and worked and manufactured the said fireclay, and carried on the said business as alone interested therein, and in the subjects let by said lease." That is plainly an erroneous statement of the law, because Logan's sequestration could not affect his position as tenant unless the appellant exercised his option of putting an end to the whole lease, which he admittedly never did. Even if the statement were accepted as correct, I do not think it could bear the construction which was put upon it by the majority of the Court. Its import appears to be that on his sequestration, Logan's interest in the lease came to an end, and that the whole rights and liabilities of tenants passed to Martin. If the interest of Logan had been thus extinguished, and the exclusive right to the lease had thereupon vested in Martin, his heir would have become the tenant on his death, and in that event the respondent did not dispute that his estate would have continued liable for the rent. But the respondent meets the statement with an explicit denial, and had it been as favourable to her case as the learned judges thought it was, I venture to doubt whether the respondent would have been entitled, without an amendment of the record, to found upon a statement which she denies, as a judicial admission in her favour.

The clause of obligation for payment of rent is in these terms:—[His Lordship read the clause as given above.]

I think it was rightly argued for the respondent that, accord-

ing to the law of Scotland, it must be presumed that an obligation to pay rent is only meant to attach to those persons who are for the time being in right of the lease as tenants. In *Skene* v. *Greenhill* (1) a tenant who had expressly bound himself, "his heirs, executors, and successors," for payment of the rent, assigned the lease with the assent of the landlord, and it was held that the cedent and his representatives were under no obligation to pay rents becoming due after the assignee entered into possession. A tenant may, however, engage that he and his representatives shall remain bound along with his successors in the lease; and, if he contracts in terms which, according to their just construction, imply that he has undertaken that responsibility to the lessor, the stipulation must receive effect. Had the obligation in *Skene* v. *Greenhill* (1) been laid upon the tenant, and his heirs, executors, and successors "all conjunctly and severally," I think the decision would have been different, because, in that connection, the words which I have added, "all conjunctly and severally," plainly import that the tenant and his representatives are to remain liable for rent along with persons succeeding to the lease as assignees. In the case of *Police Commissioners of Dundee* v. *Straton* (2), an original feuar bound and obliged himself and "his heirs, executors, and successors, conjunctly and severally," for the prestations of the feu, and the First Division of the Court decided that, after the feu had been transmitted to a singular successor, the original vassal and his estate continued to be liable to the superior for these prestations. In my opinion the same words which, in a feu-right, are sufficient to imply that the original vassal and his representatives are to remain liable in perpetuity notwithstanding their having ceased to possess any interest in the feu, must, when they occur in a lease, be equally effective to bind the original tenant and his representatives for the term of its endurance, although they have ceased to be tenants. It was suggested by the respondents' counsel, that *Police Commissioners of Dundee* v. *Straton* (2) was not well decided and ought to be reconsidered; but I am unable to see that the Court could have arrived at any other decision in

(1) 5 Court Sess. Cas. 1st Series, 25 (2nd Ed.) 27.
(2) 11 Court Sess. Cas. 4th Series, 586.

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that case, unless they had refused to attribute their ordinary meaning to the words "conjunctly and severally." The presumption that liability for rent is confined to those having the tenant's interest, is, however, so strong that if it be doubtful to what persons "conjunctly and severally" apply, those words must be read as exclusively applicable to the tenant for the time being and his representatives.

The present case seems to me to depend upon the application which ought to be given to the words "all conjunctly and severally, renouncing the benefit of discussion," as these occur in the clause of obligation for rent. Do they unite in one common obligation all the parties enumerated; or must they be read distributively, and as applying separately to the heirs, executors, and successors of Logan, and the heirs, executors, and successors of Martin? In the one view the representatives of Martin are liable for the rent as long as the lease endures; in the other, they are not liable for rents becoming due after the death of Hugh Martin, unless the tenant is his heir or assignee.

In my opinion the words "renouncing the benefit of discussion" may be treated as surplusage, because persons who are bound conjunctly and severally cannot plead the beneficium ordinis. It was argued that the words, though in that sense superfluous, are nevertheless officious as indicating that a common obligation was only to attach to such heirs, executors, and successors as were subject, inter se, to the rule of discussion; and that inasmuch as the rule had no application between the representatives of Logan and the representatives of Martin, it must have been the intention of the parties to the lease to impose a separate conjunct obligation upon each class. That argument appeared to me to be completely met by the appellant's counsel, who pointed out that the rule as to discussion, if not excluded, obtains, not only between heir and executor, but between an actual tenant and those persons who, having no interest as tenants, are bound along with him for rent, all such persons being mere cautioners in any question with the tenant.

I have been unable to resist the conclusion that, by the terms of the clause of obligation, each and all of the parties therein mentioned are made conjunctly and severally liable for rent,

irrespective of their interests, during the subsistence of the lease. I agree with Lord Rutherfurd Clark and the Lord Ordinary in thinking that the meaning of the clause is really not doubtful; and that there is no such ambiguity in its language as to entitle the respondent to the benefit of the presumption that only William Logan, the tenant, and his representatives are to be responsible for future rents.

The only term in the clause which appears to me to be capable of suggesting a construction favourable to the respondent is the word "respective," upon which much stress was laid in the argument on her behalf. If the expression used had been "their heirs, executors and successors" it was hardly contended that the respondent could have escaped from liability. But it was argued that the word "respective" is used to mark a separation between the two classes of representatives; and consequently that the clause ought to be read in the same way as if William Logan had bound himself and his heirs, executors and successors all conjunctly and severally, and Hugh Martin had in like manner bound himself and his heirs, executors and successors all conjunctly and severally. Logan and Martin begin, however, by binding "themselves" conjunctly and severally; and the word "respective" appears to me to be introduced, not for the purpose of separating the obligees into two classes, but for the purpose of indicating that the obligation common to both classes was imposed by each of them upon his own representatives, which was all that he had power to do. Then the introduction of the word "all" before "conjunctly and severally" makes it clear, in my opinion, that the two original tenants and their heirs, executors and successors, were each and every one of them to be equally liable for rent to the lessor, so long as the lease endured.

Lord Young in giving judgment, expressed an opinion that the appellant's abstaining from the exercise of his right to void the lease, and his retention of an undischarged bankrupt, who was not in possession, as his tenant, would constitute an unequitable and unconscionable device for exacting rent from the respondent, who has no beneficial interest in the lease, and can obtain no consideration for the rent which she pays. None of the other judges have expressed any opinion upon that point,

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but I think it right to say that I cannot agree with Lord Young. Martin may have made an improvident contract, but he and his representatives are not the less bound to perform the obligations which he undertook. The respondent, as representing him both in heritage and moveables, is liable for rent till the end of the lease, but it does not necessarily follow that she must continue to pay rent until the term of Martinmas, 1913. It appears from the appellant's averments on record that Logan is not possessing as tenant under the lease, and is making no claim for possession. As against Logan the respondent has all the rights of a cautioner, and in that position of matters Logan is bound either to relieve the respondent at once of the rents which she may have to pay, or to exercise the power which the contract gives him of renouncing the lease at Martinmas, 1887. If Logan when duly required refuses or delays to do one or other of these things, I do not think his wrongful failure to renounce would justify the appellant in exacting rent from the respondent after that term.

I therefore concur in the judgment which has been moved by my noble and learned friend.

Judgment appealed from reversed.

Interlocutor of the Lord Ordinary of the 12*th March*, 1885, *restored, the respondents to pay the costs in the Court below and the costs of the appeal to this House.*

Lords' Journals, 14th February, 1887.

Agents for appellant: *Grahames, Currey & Spens, for J. & J. Ross, W.S., Edinburgh.*

Agents for respondent: *Smith, Fawdon & Low, for R. P. Stevenson, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

AULD . . . . . APPELLANT; H. L. (Sc.) 1887 Feb. 15.

AND

GLASGOW WORKING MEN'S BUILDING SOCIETY . . . . . } RESPONDENTS.

Building Society—Rights of withdrawing Members—Depreciation of Assets—Resolution of Society to make Deduction from Amount at Credit of unadvanced Members—Invalidity.

The rules of a benefit building society under the Building Societies Act, 1874, provided that the unadvanced members might withdraw the sum at their credit in the society's books after certain notice. The society's property fell in value, and a majority of the members passed a resolution that 7*s.* 6*d.* per pound should be deducted from the amounts at the credit of the members and placed to a suspense account. No proceedings for winding up the society had been commenced; and there was no rule as to the manner in which losses were to be borne:—

Held, reversing the judgment of the Court of Session, that the resolution was ultra vires; and that the members who had given notice of withdrawal after the resolution were entitled to be paid the whole amount at their credit.

APPEAL from a judgment of the Second Division of the Court of Session.

James Auld, the appellant, was an investing or unadvanced member of the Glasgow Working Men's Provident Investment Building Society, the respondents. The society was incorporated under the Building Societies Act of 1874; and its rules, so far as material to the question involved in the appeal, were as follows:—

"Rule 3. The liability of any member of the society in respect of any share upon which no advance has been made is limited to the amount actually paid or in arrear upon such share. . . .

"Rule 8. Each member shall be furnished with . . . a pass book in which all payments shall be entered and initialed by such person at the head office as may be authorized to receive the money; and these entries so initialed shall be binding on the society.

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"Rule 10. Any member holding a share or shares upon which no advance has been made, may withdraw the whole or any portion of the sum at his credit twenty-eight days after he shall have given notice of his intention to do so.

"Rule 12. Payment of realized shares.—Members shall be entitled to receive payment of their shares when realised, as the funds of the society permit, in rotation, according to the dates of their application therefor, provided no unpaid advance has been made thereon, and the society shall be entitled at any time after the shares have been realised to pay them off."

At the annual meeting, held on the 29th of March, 1882, the directors' report stated, inter alia—that "the profits for the year amount to £389 12*s.*, which would seem to warrant a dividend of 2 per cent., but in respect shareholders representing about a third of the total capital of the society, have intimated their withdrawal, the directors do not feel warranted in recommending a dividend. The large number withdrawing, and the consequent weakening of the society, prompted the directors to look carefully into the securities held by the society, as in the event of any of them turning out bad, the loss would fall heavily on those shareholders who remained in the society, while the retiring shareholders would receive 20*s.* per pound and be free from all future risk. In these circumstances, the directors obtained the assistance of Mr. Binnie, who valued every property over which the directors thought there was the slightest possibility of a loss. The result of Mr. Binnie's valuation was that he considered the society's advances in a number of cases safe, and, in a number of others, he thought that the present value was not sufficient to cover the society's loan. In summing-up the amounts which Mr. Binnie thought were not covered by the present value, the directors find that the depreciation amounts to the sum of £8478 16*s.* Against this deficiency there falls to be deducted the sum at credit of reserve fund £1592 5*s.* 3*d.*, and profit and loss account £389 12*s.*, thus leaving a balance not provided for of £6505 18*s.* 9*d.*, to meet which, for the safety of the shareholders remaining in the society, and as a prudent act of management, the directors recommend that a sum of 7*s.* 6*d.* per pound be deducted from all the shareholders' accounts (exclusive of sums

paid in since the 18th of February, 1881), and placed to a suspense account."

A majority of the shareholders adopted the report and recommendation of the directors.

The appellant was the holder of ten £10 shares; and on the 18th of February, 1881, the amount which stood at his credit in the society's books was £97 2*s.* 8*d.* On the 10th of May, 1882, he gave notice to the society of his intention to withdraw the whole sum. The society declined to pay the £97 2*s.* 8*d.*, but offered him £60 14*s.* 2*d.*, being £97 2*s.* 8*d.* under deduction of the 7*s.* 6*d.* per pound. On this refusal the appellant raised this action.

By interlocutor on the 19th of February, 1885, the Sheriff-substitute found that the appellant was entitled to the whole sum at his credit in the society's books, but the Second Division (the Lord Justice Clerk dissenting) reversed this decision by interlocutor dated the 16th of July, 1885, and decided in the society's favour. (1)

On appeal,

Feb. 14. *Rhind* (with him *R. Wallace*), for the appellant:—

The judgment of the Court of Session is clearly wrong. Building societies are not partnerships. The contract between the members and the society is in each case based upon the rules of the particular society: Lord Selborne in *Walton* v. *Edge* (2), and *Brownlie* v. *Russell* (3); Lord Herschell in *Tosh* v. *North British Building Society* (4): see also *Small* v. *Smith* (5). The majority of the shareholders cannot bind the minority. What the majority did amounted to an arbitrary winding-up; but that did not prevent the society going on, and those members left in the society will reap the advantage. The passing of this resolution has given rise to three cases. The present case (6), *Galbraith's* in 1884 (7), and *Meiklejohn's* in 1885 (8). Gaibraith had given

(1) 12 Court Sess. Cas. 4th Series, 1320.
(2) 10 App. Cas. 33.
(3) 8 App. Cas. 235.
(4) 11 App. Cas. 489.
(5) 10 App. Cas. 119.
(6) 12 Court Sess. Cas. 4th Series 1320.
(7) 21 Scot. Law Rep. 782.
(8) 13 Court Sess. Cas. 4th Series, 144.

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notice prior to the resolution, and the Court held that he was entitled to be paid in full. Meiklejohn held shares amounting to £350 fully paid up in 1879. In 1880 he applied for payment of £150; and after the resolution he raised an action for payment of the entire sum at his credit. The Court, attempting to reconcile *Galbraith's Case* (1) with this case, held that he was entitled to payment of £150 in full, but to the payment of the balance of £200 only under deduction of 7*s.* 6*d.* per pound. Nine out of ten of the appellant's shares were fully paid up before 1879, and therefore he was in the position of a creditor before the date of the resolution. [He was stopped.]

Sir *H. Davey*, Q.C., and *Haldane*, for the respondents:—

No doubt the rights of the members of the society are to be found in the rules; but there are many points upon which the rules are silent, for instance, there is no rule to regulate the division of profits nor as to how losses are to be borne.

[LORD HALSBURY, L.C.:—Is not a member of the society a creditor when his shares are fully paid up?]

He is not a creditor until he gives notice of withdrawal. A member is not to be paid in the order in which his share is paid up, but in the order of his notice of withdrawal. The sum standing at the appellant's credit is a mere figure, because the funds of the society are not sufficient to meet it.

[LORD HERSCHELL:—The value of the property the society held as security affected the shareholder no further than this, that the sum standing at his credit might not be paid him. It could not reduce the sum standing at his credit. A realized share must mean a share on which instalments and interest have reached the amount of the share. How can that share after once becoming realized afterwards cease to be so?]

It is no doubt difficult to support the judgment of the Court of Session on that point, having in view rule 12.

LORD HALSBURY, L.C.:—

My Lords, in this case I confess I am unable to share the doubts which appear to have existed in the minds of the learned judges in the Court of Session.

(1) 21 Scot. Law Rep. 782.

This contract between the parties is a contract to be judged of by the ordinary rules, and the society or association which has made this contract with one of its members is precisely in the same contractual relation with its member as if it was with a stranger. The association itself is what it is. It is not a partnership at Common Law; it is not a joint stock company. Associations of this character have been under the consideration of your Lordships' House before (1). The result of those simple propositions is this, that the pursuer here had a right to enforce the contract between himself and the association of which he was a member. If the alteration, against the will of one of the contracting parties, which is insisted on here as within the competency of the other, were valid and effectual, I do not really know why the association should not have made a rule preventing withdrawal altogether because it was inexpedient and contrary to their interests that anybody should withdraw, or a rule that if anybody did withdraw he should forfeit all interest whatsoever. The truth is, that when once it is ascertained that this is a contract which is to be kept between the parties, all the observations of the learned judges, appropriate and reasonable enough if they were dealing with the relations between two co-partners at Common Law and that which should regulate the division of profits between them, become absolutely inappropriate and entirely beside the question when the consideration is whether or not a contract which has been made is to be kept.

I observed that Sir Horace Davey felt of course the pressure of the observation, and endeavoured so to construe the contract between the parties as to bring the respondents' contention within the language of the contract itself; and accordingly, instead of reading the rules of this association, which in truth constituted the contract between the parties, in their ordinary and natural sense, he ingeniously suggested that the words "the sums standing to the credit of the withdrawing member" would mean not the sums as they actually do stand and as

(1) *Russell* v. *Brownlie* (8 App. Cas. 235); *Walton* v. *Edge*, *In re Blackburn Building Society* (10 App. Cas. 33); *Tosh* v. *North British Building Society* (11 App. Cas. 489).

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they have been actually ascertained and signed by the proper officer of the society (which, according to the rules, is to be binding between the society and its members), but that they should mean that sum which, taking the true value of the assets and liabilities of the society, should be the sum appropriated to the particular member. My Lords, it appears to me not only that that is not the language of the rule, but also that it is not the meaning and intent of the rule. The meaning and intent of the rule seem obvious enough, namely, that when once the sum subscribed by the member has been handed to the society, with interest upon it according to the arrangements which have also been made, that sum shall be the ascertained sum which shall stand (and which in this case did properly stand) to the credit of the member in the books of the association.

My Lords, I do not think it necessary to proceed to shew that if this alleged construction of the rule and the principle founded upon that construction were applicable it would be possible to turn a realized share, that is to say, a fully paid-up share, into one not fully paid-up, by some resolution of the society. I say that I do not think it necessary to consider that point, because after all it is only a more striking mode of illustrating the proposition that the society can of its own motion and without the consent of both the contracting parties alter the contract between the parties. The cardinal vice which runs through the reasoning used to support such a proposition is, that it is within the competency of one of the contracting parties to alter the terms of the contract. My Lords, it appears to me that it is utterly unarguable and impossible to insist that any such power exists. A bargain is a bargain and must be kept. And for these reasons I move your Lordships that the interlocutors appealed from be reversed, and that the interlocutor of the Sheriff-substitute be restored, and that the respondents do pay to the appellant the costs both here and below.

LORD BRAMWELL :—

My Lords, I am entirely of the same opinion. The pursuer has entered into a bargain with others which gives him certain rights, and amongst them, this, that on giving notice he should be repaid

whatever stands to his credit as soon as the society is in funds to do so. That is the bargain he has entered into. A majority of those with whom he has made that bargain have thought fit to say that it shall not be performed, that it shall be set aside, and that in lieu of it another arrangement shall be made, that is to say on account of the probable poverty of the society each member shall receive something less than two-thirds of what stands to his credit. Now there is nothing in the bargain that authorizes them to do that. If there were, it would be a conditional bargain, and the bargain would be complied with, but there is nothing in it which authorizes them to do it. There is no necessity which compels them to break their bargain, because if ever the time shall arrive when they have money enough to pay him his £97 they can do it.

That being the case I protest I will not discuss whether the proposal is an equitable one or not. It seems to me so utterly wrong, when people have entered into a defined bargain, that it should be set aside upon some more or less fanciful notion of equity or right, that I will not discuss it. I will say, "Hold to your bargain." I suppose the proverb is as true in Scotland as it is in England, and true universally, that a bargain is a bargain, as the Lord Chancellor has said, and should be observed.

I really cannot but express a respectful surprise that the learned judges of the Court of Session should have held otherwise, and I think it particularly mischievous that any notion of that sort should be countenanced nowadays when there is such a disposition, and such a foolish, stupid, disposition, on the part of people to think they can make better arrangements for those who have made their own, and that it is right to set aside a particular and distinct bargain that has been entered into.

LORD HERSCHELL:—

My Lords, I am entirely of the same opinion. I do not for a moment doubt that the resolution come to at a meeting of the members of this society was arrived at in perfect good faith, and not in the slightest degree under the impression that they were altering the bargain between the parties. I have no doubt they were under the impression that the true constitution of a society

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of this description was such that the members of the society were so interested in the funds of the society as that a loss of any of the funds of the society properly fell to the lot of all. Notwithstanding that, I think they were entirely under a misapprehension with regard to what was the bargain and what is the nature and constitution of societies of this description. Nine of the shares, amounting in all to £90, had been realized long before this resolution was arrived at, and, as far as appears, many, if not all, of them before the losses occurred which led to the resolution of the society. From the moment that each share was realized, an absolute right vested in the holder of that realized share to give notice to the society and, when he had given notice, to be paid at once if there were funds and no other member had given notice, to be paid in rotation if other members had given notice. How anything that subsequently happened deprived him of that right, or turned a realized share into an unrealized share, or justified the society in refusing to carry out their 12th rule, I am utterly at a loss to see; indeed, Sir Horace Davey admitted that this seemed to have been overlooked by the learned judges in the Court below, and that he was not able to suggest how he could support the judgment as regards the realized shares, having in view the 12th rule. My Lords, I entertain no greater doubt as regards the other matter, the proportion of the shares unrealized. or if you like the whole £97 under the 10th rule. That gives a member a right in respect of the amount standing at his credit. The whole fallacy of the argument on the part of the respondents appears to me to rest in supposing that the amount standing at his credit does not mean, as it seems to me obviously to mean, the amount standing at his credit by reason of the moneys which he has paid, but that by some strange process of reasoning you are to come to the conclusion that the amount standing at his credit depends on the mode in which the society has invested the funds out of which he is to be paid the amount standing at his credit. It seems to me that the two matters have nothing whatever to do with one another. The society may have badly invested their funds, and therefore have a difficulty in obtaining the means of paying the amount standing at any member's credit; but that cannot alter the amount standing at his credit, or justify the

society in saying that what did stand at his credit no longer stands at his credit.

Upon these grounds, my Lords, I entirely concur in the judgment which has been proposed.

LORD MACNAGHTEN :—

My Lords, I entirely agree in the proposed judgment.

In societies of this sort the rules form the contract between the members and the society, and that contract can only be altered in the mode prescribed by the Act of Parliament. In this case the respondents have attempted to alter the contract in a manner which appears to me not to be justified or authorized by anything in the Act of Parliament. I therefore entirely agree in the motion which has been made.

Interlocutors appealed from reversed: Interlocutor of the Sheriff Substitute restored: Respondents to pay to the appellant the costs in the Court below and the costs of the appeal in this House.

Lords' Journals, 15th February, 1887.

Solicitor for appellant: *Andrew Beveridge for William Officer, S.S.C., Edinburgh.*

Solicitors for respondents: *Hartley, Ross & Abdale, for Carment, Wedderburn & Watson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.) 1887 Jan. 31.

LOUISA LOWE . . . . . APPELLANT;

AND

CHARLES HENRY FOX . . . . . RESPONDENT.

Lunatic—Custody—Order for Reception—Alteration of Order—Order for Discharge—8 & 9 *Vict. c.* 100 *ss.* 72, 99—16 & 17 *Vict. c.* 96 *s.* 4, *Sched A. No.* 1.

The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind under an order signed by the plaintiff's husband and containing a statement of questions and answers concerning the plaintiff. To the question "Age" the answer was "Fifty." To the question "Whether first attack," the answer was "For the last twenty years has been subject to what is termed hysteria." To the question "Age (if known) on first attack" the answer was "Thirty." To the question "When and where previously under care and treatment" the answer was "During this period of twenty years has been constantly under treatment." A few days after the plaintiff had been received into the asylum the last answer was altered by adding to it the words "For hysteria by" several doctors whose names were given. No copy of the order as so altered was sent to the Commissioners, nor did they sanction the alteration. Afterwards the plaintiff's husband wrote a letter to the defendant begging him to discharge the plaintiff "as soon as you may think it advisable." Notwithstanding this letter the defendant detained the plaintiff for a considerable time. The plaintiff having brought an action against the defendant for maliciously and without reasonable or probable cause assaulting and imprisoning her, the defendant relied upon 8 & 9 Vict. c. 100 ss. 99, 105:—

Held, affirming the decision of the Court of Appeal (15 Q. B. D. 667), that the answers were a sufficient compliance with the requirements of 16 & 17 Vict. c. 96 s. 4, and Sched. A. No. 1; that the alteration not being of a material part of the order did not invalidate the order; that the letter written by the plaintiff's husband to the defendant was not an order of discharge within the meaning of 8 & 9 Vict. c. 100 s. 72; and that there was no evidence for the jury in support of the plaintiff's case.

APPEAL from a decision of the Court of Appeal (1).

The appellant having brought an action against the respondent for damages for having maliciously and without reasonable and probable cause assaulted and imprisoned the plaintiff, the statement of defence denied the malice, the assault and imprisonment, and relied upon 8 & 9 Vict. c. 100 ss. 99, 105, and 21 Jac. 1

(1) 15 Q. B. D. 667.

c. 16 s. 3. At the trial before Pollock B. and a special jury at the Taunton Assizes in January 1885 the following facts were proved or admitted.

On the 23rd of September 1870 the plaintiff's husband the vicar of Up Ottery, Devon, signed an order requesting the defendant to receive the plaintiff, a person of unsound mind, as a patient at the defendant's house near Bristol, which was licensed for the reception of lunatics. The order was accompanied by two medical certificates, and contained at the foot a statement in the form given by 16 & 17 Vict. c. 96, Sched. A. No. 1, of which the material parts were as follows: The age of the patient was stated as "Fifty." The answer to the question "Whether first attack" was "For the last twenty years has been subject to what is termed hysteria." To the question "Age (if known) on first attack" the answer was "Thirty." To the question "When and where previously under care and treatment" the answer was "During this period of twenty years has been constantly under treatment." Under this order the plaintiff was on the 27th of September received by the defendant. On the 28th of September the defendant gave notice to the Commissioners in Lunacy of the plaintiff's reception and transmitted to them a copy of the order. During the course of the action the plaintiff discovered that the last answer above quoted had been on the 1st of October altered by adding to it the words "for hysteria by Dr. Conolly, Hanwell, Dr. Macintosh, Torquay, Dr. Monior, Geneva &c." As so altered the order was received by the defendant on the 2nd of October. This alteration did not receive the sanction of any of the Commissioners in Lunacy, and no copy of the order containing the alteration was ever sent to the Commissioners (see 16 & 17 Vict. c. 96 s. 11). On the 19th of January 1871 the Commissioners wrote to the defendant and to the plaintiff's husband that in their opinion the plaintiff should be discharged. On the 20th the plaintiff's husband wrote to the defendant enclosing a copy of the Commissioners' letter to him and adding, "After the Commissioners' letter I suppose I must consent to Mrs. Lowe's discharge, and beg that you will carry out their suggestion as soon as you may think it advisable." The plaintiff was nevertheless detained at the defendant's asylum till February.

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Pollock B. being of opinion that the order for reception was valid, and that the letter of the 20th of January 1871 was not an order of discharge, directed the jury to return a verdict for the defendant, and entered judgment for him. The Divisional Court (Grove and Denman JJ.), being of opinion that having regard to the answers in the statement there was a question for the jury whether the defendant had bonâ fide acted in pursuance of the statute, set aside the verdict and judgment and ordered a new trial. The Court of Appeal (Lord Esher M.R. and Bowen L.J.) reversed the decision of the Divisional Court and restored the judgment of Pollock B. (1). Against this decision the plaintiff appealed.

Dec. 3, 6, 1886. Jan. 31, 1887. The appellant in person :—

Pollock B. was wrong in directing a verdict for the defendant, for there was a case to go to the jury. There was abundant evidence of malice, in the mode in which the defendant acted under the original order, procured and acted under the alteration, and kept the plaintiff even after receiving the order of discharge.

In the first place the original order was invalid, not being in the form prescribed by 16 & 17 Vict. c. 96 Sched. A. No. 1. The statement (which is an essential part of the order) did not answer in unambiguous language as it ought to have done whether the attack under which the appellant was alleged to be then suffering was the first attack of lunacy, idiotcy, or unsoundness of mind, or whether the appellant had ever before had an attack of either of these diseases. The answer "For the last twenty years has been subject to what is termed hysteria" is no answer to the question "Whether first attack." The answer "thirty" to the inquiry "Age (if known) on first attack" was a statement that the appellant was thirty years of age when she had the first attack of unsoundness of mind, and this and the statement before made that the appellant was at the date of the order fifty years of age, taken together, were an allegation that her first attack of unsoundness of mind was twenty years

(1) 15 Q. B. D. 667.

before the date of the order. The questions "When and where previously under care and treatment" are not answered according to the true meaning of the statute. All these answers were insufficient and misleading. The Court of Appeal gave two meanings to the words "first attack," viz., "attack of insanity," and "attack of hysteria," whereas the statute must have used "first attack" in the same sense all through, i.e. first attack of insanity. The only illness justifying detention, the only illness dealt with by the statute, is lunacy, idiotcy, or unsoundness of mind. The only answers permitted by the form given in 16 & 17 Vict. c. 96 Sched. A. No. 1 are "Yes," or "No," or "I do not know." The form expressly says that the person signing the order if he does not know the facts shall say so.

Secondly, the statement (which is part of the order) having been altered the order became invalid, and that for several reasons. The defendant sent no copy of the altered statement to the Lunacy Commissioners, as he was bound to do by 16 & 17 Vict. c. 96 s. 11. Not having received the sanction of the Commissioners, it had no force or effect, as expressly provided by that section. If an order is altered in the manner adopted in this case the visiting Commissioners cannot properly comply with the provisions of 8 & 9 Vict. c. 100 ss. 61, 62. Any one of the defects or omissions above pointed out with regard both to the original and the amended order is enough to deprive the defendant of the protection given by the statute and to render him liable in this action: *Hall* v. *Semple* (1); *Reg.* v. *Pinder* (2). The mere alteration in the order invalidated it, as in the case of an alteration of a deed: *Pigot's Case* (3); of a bill of exchange; *Master* v. *Miller* (4); bought and sold notes: *Powell* v. *Divett* (5): a guarantee: *Davidson* v. *Cooper* (6); a charterparty: *Crookewit* v. *Fletcher* (7); a Bank of England note: *Suffell* v. *Bank of England* (8).

Thirdly, the letter of the appellant's husband of the 20th of January 1871 was an order of discharge which required the defen-

(1) 3 F. & F. 337, 350.
(2) 24 L. J. (Q.B.) 148.
(3) 11 Rep. 26.
(4) 4 T. R. 320; 1 Sm. L. C. 857 (8th Ed.).
(5) 15 East, 29.
(6) 13 M. & W. 343.
(7) 26 L. J. (Ex.) 153.
(8) 9 Q. B. D. 555.

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dant to discharge the appellant forthwith. The statute makes the defendant responsible for keeping her after that letter; it gives no discretion to the keeper of the asylum. The defendant ought (if he refused to discharge) to have certified under sect. 75 of 8 & 9 Vict. c. 100 which enables the keeper of the asylum to certify that the patient is dangerous and unfit to be at large. These matters are evidence of malice which ought to have been submitted to the jury.

Sir *E. Clarke* S.G. and *R. O. B. Lane* for the respondent were not heard, and the question decided in the Court of Appeal upon the Statute of Limitations and the Married Women's Property Act 1882 was not argued on this appeal.

LORD HALSBURY L.C. :—

My Lords, in this case the plaintiff has argued her appeal not only with great ability but with great propriety, and I think has established beyond all question that whatever the state of her mind was in the year 1871, she is at all events now in the full possession of her faculties.

In order to detain the plaintiff in the asylum, the gentleman who received her there was bound to receive with her an order justifying that detention, and I think it would be a misfortune if any doubt could be thrown upon the question whether or not that order comprehended not only the mandatory part to keep her under detention but the particulars which the statute requires as an essential part of the order. So much the plaintiff has established. But the question here is whether in truth (I speak of it now in its original condition, I will deal with the question of its alteration presently) the order was not a compliance with the statute, and I think it is impossible to deal with this order, or indeed with any other written instrument, in the way in which the plaintiff has sought to deal with it, namely, to dissociate it from its context, to dissect it into its parts and to read each of those parts as if it had no relation to or dependence upon the rest. The order must be treated as a whole. The question here is whether this order, properly understood by a reasonable mind,

does not give all the particulars which it was required that a medical man should have upon receiving the order.

Each part of the order has reference to the rest, and after giving the name and the age, and the condition whether married or single, and the condition of life and the religious persuasion, the first statement is that her previous residence was "Vicarage, Up Ottery." I think one cannot dissociate even that statement from the fact that the person signing the order and responsible for its accuracy is a person who lived there also, namely, her husband, and the question which arises upon the following answer would appear to arise upon a hypothesis which I for one do not accept, that each question in this form is intended to be answered "Yes" or "No." No doubt when one requires a categorical reply, the answer "Yes" or "No" is the appropriate answer; but I can conceive cases (and I think this case itself affords an illustration) of a condition of things in which an answer "Yes" or "No" would not give full information and would be liable to mislead.

As the appellant herself has very appropriately observed, we have nothing to do with the truth or falsehood of the statements herein. The certificates of the doctors and the allegations made are made upon their respective responsibilities; but all that which the keeper of the asylum has to regard is whether the statements which are made in the order are such as to justify him in exercising the powers given to him under the statute, of detaining in confinement the person committed to his charge; and he is made acquainted with these facts by the statement of the husband of the lady whose previous place of abode had been the vicarage of Up Ottery where this lady lived. The husband is asked "Whether first attack?" I agree with the appellant's argument that if you are to take that question by itself, and the answer to it by itself, and not associate it with the context, "first attack" must mean the first attack with reference to that which alone the keeper of the house has to consider, namely, the state of her mind. Under ordinary circumstances the answer would be either "Yes" or "No;" but supposing the person is endeavouring to give information and is endeavouring to inform the medical man of the true state of the facts, would it be an adequate answer to say "Yes, the first attack," without further explanation? If

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he had said, "Yes, it is the first attack of that which I consider to be absolute insanity, but the fact is that for the last twenty years the lady has been in the borderland between insanity and hysteria," no one can doubt that besides giving the answer he was bound to give he would have given valuable and important information. What does he say? He says "For the last twenty years has been subject to what is termed hysteria." Upon the most ordinary construction of language, surely the person who is pledging his veracity to that statement means, "She has not been suffering from anything I am entitled to call insanity, but I tell you as a fact that for twenty years I have had experience of this, that she has been suffering from what is termed hysteria." No one can doubt that that will not make the information given as part of the order inaccurate, or the order itself invalid. But what is contended apparently is that this is an implied allegation that for twenty years this lady has been insane. It seems to me no rational person could come to such a conclusion. The obvious and natural meaning of it is that she has not been for that time insane, but has for twenty years suffered from hysteria.

That being the language of the answer to this question, the next is "Age (if known) on first attack," and the answer is "Thirty." Here again I agree that the hypothesis of the question is first attack of insanity, and if that had stood alone and without being associated with the answers and questions with which it is associated I think the natural conclusion from it would have been that it meant the first attack of insanity. But (and that has been the fallacy of the appellant's argument thoughout) you cannot dissociate that answer from the others with which it is associated, and when one sees that the person has been suffering for twenty years from what is described as hysteria, the previous part of the order having shewn that the lady's age was now fifty, I should have thought that no one could have doubted that the "Age on first attack" "Thirty" pointed to the fact that the first attack was an attack of that from which she had been suffering for twenty years, namely hysteria. Twenty from fifty leaves thirty, and that is the accurate description of her age at the time of the first attack.

Then there comes "When and where previously under care and

treatment." It is necessary to observe here the form of the question, because it is clear that what that form of question means is that if a person has been previously insane and previously under care as an insane patient, the when and where should be stated. It is to be observed that in the answer the word "care" is designedly omitted, because that would be applicable to patients under the care of persons who would restrain their liberty. Accordingly that is not answered; but the answer is "During this period of twenty years has been *constantly under treatment;*" "care and treatment" being respectively as I think intended to point to where under care and what periods of treatment. The answer upon the facts as we now know them appears to be perfectly accurate. She never was under any care as an insane person, but the writer of this document says "As I have already told you in effect that for twenty years she has been suffering from hysteria, so in answer to this question I tell you that during that period of twenty years she has been constantly under treatment. Under treatment for what? Why for that which I have been previously describing in this document." The next question is "Duration of existing attack" and the answer is "About a fortnight since." Then follow questions and answers which are immaterial for this purpose.

It seems to me that no one with a knowledge of the facts as we are now possessed of them could have answered those questions with a more apparent scrupulous regard to giving the whole state of the facts. I construe this document, and I think the keeper of the house would construe this document, to mean that there has been no previous insanity, that there has been no previous detention under "care." That is how, I think, the keeper of this asylum construed this document. If so, it appears to me that the whole foundation of the argument fails; because it is not a question of a mistake or an irregularity which might be cured so far as the liability of the person is concerned by a bonâ fide belief in the statement and an intention to carry out the provisions of the statute; but, in the view which I take of this case, the statute has been obeyed, for it nowhere requires that the language of this instrument shall be categorical in its character, but requires that it shall truly on the face of it give answers

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to the questions propounded as part of the order which is to justify the detention.

I pass on to the question whether or not the alteration which was made in this order deprives it of any validity; and upon that question I wish to guard myself. I should entirely concur with the appellant that in an order of this description, which, as she truly says, is the foundation upon which the person keeping the asylum is entitled to detain persons and restrain them from the liberty to which they otherwise have a right, if a material part of it was altered, so that the document no longer spoke the language which it did speak when it was originally received and upon which the detention was authorized, that vitiated the document. And I think it would be a very calamitous view of the state of the law if any doubt could be entertained as to whether such a misuse of the authority given by the statute could be made with impunity. It is as well, I think, that it should be generally known and understood that any tampering with a document of that sort would impair its validity and deprive any person professing to act under it of any protection from it. But in all the cases which the appellant has quoted, and in accordance with the principles upon which those cases were decided, it may be clearly perceived that in each and every one of them materiality was an essential condition to make the instrument void.

Now what is the addition which is said to make this document invalid? "During this period of twenty years has been constantly under treatment;" that was how the document originally stood. Then come the words "for hysteria." It is to be observed that in the last preceding answer but one the allegation as to the twenty years was, that she was subject to hysteria for that time; so that the hysteria, the supposed complaint, which is so far the only thing added, is a mere addition of something which has already appeared upon the face of the instrument. Then comes a statement of various persons by whom the lady has been treated, and it is stated that she has been treated by "Dr. Conolly" of "Hanwell." I introduce the word "of" because it seems to me that that is the necessary and obvious interpretation of the language. The words actually are, "Dr.

Conolly, Hanwell, Dr. Macintosh, Torquay, Dr. Monior, Geneva, &c." I do not think that any rational person reading those words would entertain the smallest doubt that the allegation intended to be made by them was that the lady had been under treatment by those various doctors, identifying them by their different residences, and that she had been under treatment by those doctors for the hysteria which had been previously stated to be the complaint under which she had been suffering for the last twenty years.

I now come to the last point, which turns upon the language of the statute; and it is not unimportant to observe what the statute provides (1):—"If and when any person who signed the order on which any patient was received into any licensed house shall by writing under his hand direct" (I am leaving out the words which are not appropriate to the present purpose) "that such patient shall be discharged or removed, then and in such case such patient shall forthwith be discharged or removed as the person who signed the order for his reception shall direct." The question is whether the letter of the 20th of January complied with the conditions of that section. That point appears to me to be beyond all doubt. No doubt the appellant is right in saying that the person who signed the order had no right to appeal to the discretion of the keeper of the asylum. I think she has made out that it is a question of acting under the authority of the statute, and that the person who had her under lawful detention already was bound, if he received an order, not to exercise a discretion but to comply with the order if it was such as is prescribed in the language of the section. But the question for your Lordships is whether it was an order; and when it is relied upon as an order or authority, one must see what is the language of the instrument itself, so as to ascertain whether there was an order, a peremptory order, to discharge absolutely, giving no authority or discretion to the person who had the lady under detention not to act upon it. It is impossible to read the language of the instrument and not to see (indeed the lady herself seems to be conscious of the fact) that the person sending that letter shrank from the responsibility of giving an

(1) 8 & 9 Vict. c. 100, s. 72.

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absolute order, and intended to leave it to the discretion of the person who was to receive that which she describes as an order.

The question then is whether the person who acted in pursuance of that direction and fulfilled strictly the authority which he got, namely, to exercise a discretion to retain the lady, disobeyed an "order" within the language of the statute. It seems to me that it is impossible to maintain for one moment that he did; and I am therefore of opinion, and so move your Lordships, that the judgment of the Court of Appeal should be affirmed and that this appeal should be dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion, and I am satisfied with the reasons which have been assigned by the Lord Chancellor. It appears to me that so far as concerns the order of admission the Divisional Court erred in reading each of these answers separately in connection with the question to which it is appended, without taking into account the plain connection, both in grammar and in substance, which subsists between them all.

LORD FITZGERALD:—

My Lords, I also concur in the judgment which has been delivered by the Lord Chancellor, affirming the judgment of the Court of Appeal and adopting its reasons.

LORD HERSCHELL:—

My Lords, I am entirely of the same opinion, and I only desire to add that I entirely concur with what my noble and learned friend has said as to the alteration of such a document as this. I think it is important that it should be understood that the judgment which we are delivering rests upon the fact that the alteration was an alteration wholly immaterial, and that it is not intended to cast any doubt upon the proposition that the alteration of a document of this description in a material particular, if made at all events with the privity and knowledge of the person who is relying upon it, would make it invalid and would

preclude him from legally relying upon it. I say that because certain expressions have been cited which would seem to indicate that in some cases at all events of a somewhat similar description a document is invalidated even if the alteration be made against the will and in fraud of the person who has charge of it and who has to rely upon it. For my own part I desire entirely to reserve my opinion upon that point until it arises, because I do not feel at present prepared to say that in every case an alteration, which would invalidate the document when made with the privity and knowledge of the person having the custody of it and relying upon it, would invalidate it if made in fraud of him and against his will.

LORD MACNAGHTEN:—

My Lords, I am of the same opinion.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 31st Jan. 1887.

Solicitors for appellant: *T. White & Sons.*

Solicitors for respondent: *Mead & Daubeny for Fox & Whittuck, Bristol.*

[HOUSE OF LORDS.]

H. L. (I.) 1887 Feb. 14.

THE GREAT WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

CALLAGHAN McCARTHY . . . . . RESPONDENT.

Railway Company—Carrier—Alternative Rates—Just and reasonable Conditions—Railway and Canal Traffic Act 1854 (17 & 18 *Vict. c.* 31) *s.* 7.

Cattle were carried by a railway company under a special contract signed by the consignor which stated that the company had two rates for the conveyance of cattle; one the ordinary rate when they took the ordinary liability of the carrier; the other a reduced rate; that these cattle were to be carried at the reduced rate, the company to be relieved from all liability in case of damage or delay except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants. A notice was posted up in the company's office which stated that the company had two rates, namely the owner's risk rate upon the terms above given, and the company's risk rate, which was ten per cent. above the owner's risk rate, at which the company undertook the ordinary risk of carriers in respect of rail transit, limited for neat cattle to £15, for pigs and sheep to £2, but did "not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The consignor had never seen any rate but the owner's risk rate. After two trials cattle had ceased to go at the higher rate. The higher rate was less than the maximum allowed by the company's Acts. No list of rates was exhibited.

The cattle having been injured through the negligence (but not the wilful misconduct) of the company's servants:—

Held that the notice of the higher rate was not invalidated by the limitation as to value, nor by the fact that it did not mention the terms upon which cattle could be carried without limitation of value as provided by the Railway and Canal Traffic Act 1854 s. 7; that the clause as to not admitting liability meant only that the liability must be established by proof; that so construed the condition was just and reasonable within s. 7; that the consignor might have known and must be taken to have known the terms of the higher rate, and had the offer of a just and reasonable alternative; and that the company were therefore protected by the special contract.

The decision of the Irish Court of Appeal (L. R. Ir. 18 Q. B. D. 1) reversed.

APPEAL from a judgment of the Court of Appeal in Ireland (1). The respondent having brought an action against the appellants

(1) L. R. Ir. 18 Q. B. D. 1.

for damages for loss of and injury to his cattle while being carried by the appellants, the cause was tried before Morris C.J. and a special jury in November 1884, when the following facts were proved.

The cattle were delivered by the plaintiff's agents, Sheedy & Sons, at Cork to the defendants' agents to be carried from Cork to Colney Hatch, Sheedy & Sons signing a consignment note in the following terms :

"Great Western Railway.

"Consignment of cattle, horses, sheep, pigs, &c., to be carried at owner's risk.

"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of cattle, horses, sheep, pigs, &c.; one, the ordinary rate or toll, when they take the ordinary liability of the carrier; the other, a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants.

"To the Great Western Railway Company.

"Cork Station April 27 1883.

"Receive and forward the undermentioned cattle or horses to be carried at the reduced rate, below the company's ordinary rate or toll, in consideration whereof I undertake to relieve the Great Western Railway Company, and all other companies over whose lines the cattle or horses may pass, from all liability in case of damage or delay, except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions and regulations on the back of this note."

Some of the cattle were killed and some were injured in a collision between Bristol and Colney Hatch caused by the negligence of the defendants' servants.

For the defendants it was proved that the following notice was in 1880 or 1881 posted up in the office of the defendants' agents at Cork; that the higher rate there mentioned was less than the maximum rate allowed by the company's Acts, and that after two

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trials of it the shippers ceased to go at the higher rate. No list of rates was exhibited, but they were in the agents' books.

"Great Western Railway.
(*Of England.*)

"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of live stock from Cork to places in England and forwarded over their line from New Milford or Bristol. Namely,—The owner's risk rate at which the company undertake no risk in respect of rail transit except for loss which can be proved to have arisen through wilful negligence or misconduct on the part of the company, and the company's risk rate which is ten per cent. over and above the before-mentioned owner's risk rate at which the company undertake the ordinary risk of carriers in respect of rail transit up to the following limits:—

"Neat cattle a sum not exceeding £15.
"Pigs and sheep a sum not exceeding £2.

but do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck."

Sheedy & Sons who had been shippers for many years swore that they had never seen any rate but the one at owner's risk. The jury returned a verdict for the plaintiff for £403 11*s.* 8*d.*, Morris C.J. being of opinion that the company were not exonerated by the terms of the consignment note "as there was no table of rates exposed, nor in his opinion a reasonable alternative offered. The defendants had no printed contract for ordinary rates, nor any contract regulating a carriage from Cork."

The Irish Exchequer Division (Palles C.B. and Dowse B.) discharged a conditional order which had been granted for a new trial on the ground of misdirection, basing their decision on the ground that the defendants had not complied with the requirements of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) s. 93 as to the publication of tolls.

On appeal, the Irish Court of Appeal (Lord Ashbourne L.C., FitzGibbon, Barry and Naish L.JJ.) dismissed the appeal (1),

(1) L. R. Ir. 18 Q. B. D. 1.

their judgments turning upon their view of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) s. 7 (1).

Against this decision the present appeal was brought.

July 26, 27, 29, 1886. Sir *R. Webster* Q.C. and *J. G. Gibson* Q.C., of the Irish Bar, (*R. S. Wright* with them) for the appellants :—

It is admitted that in order to make such a special contract binding it must not only be signed by the consignor but must be just and reasonable within the Railway and Canal Traffic Act

(1.) Sect. 7 : "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle or other animals or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivery of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums herein-after mentioned ; (that is to say,) for any horse, £50; for any neat cattle, per head, £15 ; for any sheep or pigs, per head, £2 ; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above-mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will 4, c. 68, and shall be binding upon such company in the manner therein mentioned : provided also, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury : provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the 11. Geo. 4 & 1. Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act."

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1854 (17 & 18 Vict. c. 31) s. 7. There must be an alternative rate open to the consignor. Here the special contract itself, that is the consignment note, gave the consignor distinct notice that there was an alternative or higher rate at the company's risk. After signing that, without making any inquiry as to what the higher rate was, or whether it was just and reasonable, he was estopped; he accepted the owner's risk rate, whatever the other might be; whether it was just and reasonable or not. The consignment note told the consignor that the company had an ordinary or higher rate, whereby they undertook the ordinary liability of a common carrier. The plaintiff now says that the notice of the higher rate contained conditions limiting the liability which were not just and reasonable; but he cannot avail himself of that argument, for upon the evidence of his own agents they admitted they did not know of that notice. But supposing that argument is open to him, the answer is that the conditions of the higher rate are not unjust and unreasonable. The limitation of value is that imposed by the Railway and Canal Traffic Act 1854 s. 7, and cannot therefore be complained of. Nor is there anything unreasonable in the last clause of the notice if the words "do not admit liability" are construed to mean that the consignor must prove how the injury occurred. That is the true construction, and so read there is nothing to contravene the provisions of the statute. The statute does not say that a rate at the liability of a common carrier is the only alternative allowed: there is nothing illegal in offering a higher rate with a condition attached: *McNally* v. *Lancashire and Yorkshire Railway Company* (1); *Beal* v. *South Devon Railway Company* (2). That higher rate was in the present case much under the maximum allowed to the company, and was reasonable in fact. That being so, the case falls within the principle of *Manchester, Sheffield and Lincolnshire Railway Company* v. *Brown* (3) and *Lewis* v. *Great Western Railway Company* (4).

The arguments founded by the Irish Exchequer Division (5) upon the non-publication of the tolls required by 8 & 9 Vict.

(1) L. R. Ir. 8 Q. B. D. 81, 93.
(2) 3 H. & C. 337.
(3) 8 App. Cas. 703.
(4) 3 Q. B. D. 195.
(5) L. R. Ir. 18 Q. B. D. 7, 8.

c. 20 s. 93 are not relevant; the tolls there referred to are not the rates now in question.

[*H. Matthews* Q.C. stated that he did not intend to argue the last point.]

H. Matthews Q.C. and *Matthew J. Bourke*, of the Irish Bar, for the respondent:—

In order to exempt the railway company from liability, the alternative rate must not only be alleged to exist but must be proved actually to exist, and it must be a real alternative, and the conditions thereof must be just and reasonable: *Manchester, Sheffield and Lincolnshire Railway Company* v. *Brown* (1); *Lewis* v. *Great Western Railway Company* (2); *Peek* v. *North Staffordshire Railway Company* (3). Unless they establish all this the company are liable, and the onus is on them, for primâ facie the consignment note was not just or reasonable. It is not only the offer but the existence of a real alternative rate which removes this primâ facie liability. The consignment note stated that the company had a higher rate at the company's risk: but the plaintiff's agents never knew the terms of that rate. When examined it is found not to be what the consignment note described it to be: it is clogged with limitations of liability which make it unjust and unreasonable. The English cases (except *Beal* v. *South Devon Railway Company* (4)) assume that the alternative rate must be one at the full carrier's liability. But it was suggested that it might be short of that in *McNally* v. *Lancashire and Yorkshire Railway Company* (5) (the decision in that case being strongly in support of the respondent). That suggestion is erroneous: to make the alternative rate good it must be at the full liability of a common carrier. But it is not necessary to go that length in this case, for the liability of a common carrier is limited by two conditions either of which is enough to invalidate the rate. The more important condition is contained in the last clause. This clause means that the company are not to be liable if the cattle die of disease from any cause or can walk out of the truck, what-

(1) 8 App. Cas. 703, 710, 719.
(2) 3 Q. B. D. 195, 204, 209.
(3) 10 H. L. C. 473, 512.
(4) 3 H. & C. 337.
(5) L. R. Ir. 8 Q. B. D. 81, 93.

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ever the injury and from whatever cause. Such a limitation clearly invalidates the rate. The notice must be looked at as a whole and those parts which are contrary to the statute must not be excluded. Including them, the higher rate offered is unjust and unreasonable. No action could have been brought against the company for refusing to carry, for this company are not common carriers of cattle from Cork. It may be that the protecting clause would be held not binding as contravening the Act; but that does not make any difference; there has been no *offer* of a just and reasonable alternative. Such a clause cannot be struck out and disregarded: *Lloyd* v. *Waterford and Limerick Railway Company* (1), a case very similar to the present. Being ambiguous it must be read strictly against the company. Such a clause would deter an intending consignor from sending. Even supposing the clause means no more (as the appellants contend) than that the sender must prove how the injury happened, it equally vitiates the notice: it is a threat; an obstruction in the way of the consignor getting the company's liability. So does the stipulation limiting the liability to £15, for there is no provision enabling the sender to declare the value above that amount and pay a reasonable percentage upon the excess, as required by the statute.

Sir *R. Webster* Q.C. in reply :—

The alternative rate must be a just and reasonable one and the House ought to construe this notice so as to make the alternative valid if it can bear such a construction. As to the limit of £15 &c., it does nothing more than claim the right to the benefit of the statute. The final clause "do not admit liability" cannot be turned into "shall not be responsible for"—words which were in *Peek* v. *North Staffordshire Railway Company* (2), which distinctly exempted the company from responsibility for negligence. The words mean that the consignor will not prove the responsibility of the company by shewing that the animals arrived dead, or in such condition &c. If an animal dies of disease that is to make no primâ facie case: the consignor must shew that the disease was caused by the company's negligence. As to the argument that

(1) 15 Ir. C. L. Rep. 37, 53, 54.

(2) 10 H. L. C. 473, 476.

the consignment note did not state the terms of the alternative rate, that does not help the plaintiff. It is not necessary that it should: *Moore* v. *Great Northern Railway Company* (1). It is enough that the plaintiff knew there was an alternative: and he either knew or might have known and must therefore be taken to have known the terms.

The House took time for consideration.

Feb. 11, 1887. LORD HERSCHELL:—

My Lords, the plaintiff in the action on which this appeal arises seeks to recover from the defendants the sum of £403 11*s.* 8*d.*, being the damages sustained by him owing to the injury to certain cattle consigned to the defendants to be carried from Cork to Colney Hatch, the injury having arisen from the negligence of the defendants' servants.

The defendants do not dispute the negligence alleged, but they rely upon the contract under which the cattle were carried as exempting them from liability.

The plaintiff admits that those who arranged for the carriage of the cattle on his behalf signed a consignment note in the following terms:—"Receive and forward the undermentioned cattle or horses to be carried at the reduced rate, below the company's ordinary rate or toll, in consideration whereof I undertake to relieve the Great Western Railway Company and all other companies over whose lines the cattle or horses may pass from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants." But he insists that the condition exonerating the defendants from liability for the negligence of their servants is not "just and reasonable," and that the company are liable by reason of sect. 7 of the Railway and Canal Traffic Act 1854, notwithstanding the terms of the contract under which they were carrying the cattle.

This is, I think, the sole question in the action, for no evidence was given of "wilful misconduct on the part of the company's servants."

(1) L. R. Ir. 10 Q. B. D. 95.

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Before proceeding to consider the question thus raised, it may be desirable to state the course which the proceedings have taken in the Courts below.

At the conclusion of the trial of the action Morris C.J., before whom the case was tried, held that the contract signed by the plaintiff's agent did not exonerate the defendants as there was no table of rates exposed, and there was not, in his opinion, a reasonable alternative offered. He accordingly entered judgment for the plaintiff.

A conditional order to set aside this judgment and enter judgment for the defendants, or for a new trial, was afterwards obtained in the Exchequer Division by the defendants. At the close of the argument the learned judges made an order absolute for a new trial, but reserved the formal statement of their reasons for the judgment until the next term. Whilst preparing these reasons the learned Chief Baron came to the conclusion that the effect of the company's non-compliance with the provisions of the Railways Clauses Act of 1845 had not been sufficiently considered, and at his suggestion the order made was vacated by consent, and the case was re-argued before the Chief Baron and Baron Dowse.

Those learned judges allowed the cause shewn against the conditional order. They rested their judgment exclusively upon the ground that the defendants had not complied with sect. 93 of 8 & 9 Vict. c. 20, by exhibiting their tolls upon a board in the manner prescribed by that section, holding that no reasonable alternative could be said to be offered to the person whose goods were to be carried unless such alternative charge was exhibited by the company in the manner so prescribed.

The case then went to the Court of Appeal. The learned judges of that tribunal, although they affirmed the decision of the Court below, did not base their judgments upon the non-compliance with the provisions of sect. 93. I think it is manifest from a perusal of their judgments that they did not consider that the ground taken in the Court below was a sound one. I confess I have no hesitation in arriving at the same conclusion. If reasonable terms were in fact offered to the consignor I am quite unable to find anything either in sect. 93 or in any other

part of the Act of 1845 to deprive the company of whatever would be the legal result of such an offer because they failed to comply with the terms of sect. 93.

The Court of Appeal decided the case on the ground that the only offer made to the plaintiff other than that which he accepted was, in their judgment, not just and reasonable. It becomes necessary, therefore, to examine the facts proved at the trial.

I observe at the outset that the consignment note signed by the plaintiff's agent directs the company to carry the cattle "at the reduced rate below the company's ordinary rate or toll." And these words manifestly refer to the earlier part of the consignment note which contains a notice that the company "have two rates for the conveyance of cattle, &c., one, the ordinary rate or toll, when they take the ordinary liability of the carrier; the other, a reduced rate, when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants." This consignment note was no new document to the plaintiff's agent. He had constantly signed notes in this form. I can entertain no doubt that he was perfectly familiar with its contents. If he was not he certainly ought to have been, and must be treated as if he were. He knew, therefore, that the company purported to have two rates, and to give him a choice between them. He states that he "never saw any rate but the one." And his father, who is in partnership with him in the shipping business, also states that he never saw any different scales of prices in the shipping office. But there appears to be no doubt that in 1880 or 1881 a notice was posted up in the office of the company which was in these terms:—"Great Western Railway (of England). The Great Western Railway Company hereby give notice that they have two rates for the conveyance of live stock from Cork to places in England and forwarded over their line from New Milford or Bristol. Namely:—The owner's risk rate, at which the company undertake no risk in respect of rail transit except for loss which can be proved to have arisen through wilful negligence or misconduct on the part of the company; and the company's risk rate, which is ten per cent. over and above the before-mentioned owner's risk

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rate, at which the company undertake the ordinary risk of carriers in respect of rail transit up to the following limits: Neat cattle, a sum not exceeding £15; pigs and sheep, a sum not exceeding £2; but do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck."

I will accept as a fact that the plaintiff's agent had not seen this notice. But he knew that there were two rates and that he was requesting the company to carry the cattle at the lower one; and he could at once have ascertained what the higher rate was by inquiring of the company or by examining the notices exhibited in the office. Under these circumstances I think it is impossible to do otherwise than hold that the offer to carry at the higher rate upon the terms of the notice was made to the plaintiff through his agent, and that he had the alternative presented to him by the company of either carrying at that rate upon those terms or at the reduced rate upon the terms of the consignment note, and voluntarily elected to take the latter alternative.

So far, I think, my views are in complete accord with those of all the judges who took part in the judgment of the Court of Appeal in Ireland.

Taking the facts to be what I have indicated, I proceed to consider what is the law which must govern the determination of the case.

I think the law upon some of the points that arise is conclusively settled by authority. It is not open to doubt since the case of *Peek* v. *North Staffordshire Railway Company* (1) that a contract exempting the company from liability in the terms of the consignment note in the present case is primâ facie not just and reasonable, and that if no other alternative is offered to the consignor the company are liable for the negligence of their servants, notwithstanding the stipulations of the contract of carriage. It is equally well settled, since the decision of your Lordships' House in the case of *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (2), that if the consignor has an offer bonâ fide made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses in considera-

(1) 10 H. L. C. 473.

(2) 8 App. Cas. 703.

tion of a pecuniary benefit to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be so.

It appears to me that all the questions in the present case resolve themselves into this one: was the alternative offered to the plaintiff, and which it was open to him to accept in lieu of that contained in the contract which he in fact entered into, a just and reasonable one?

I may remark before I proceed further, that, in my opinion, the question whether a contract is just and reasonable within the meaning of the statute must be determined by the Court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination. I make this observation because Palles C.B. appeared to think, and indeed acted upon the view, that if the plaintiff was not entitled to retain his judgment the proper course was to grant a new trial. With all respect to that learned judge, I find myself constrained by the language of the statute to take a different view.

I now turn to the consideration of the terms upon which the company intimated that they were prepared to carry at what they designated the company's risk rate, and to the inquiry whether they constituted a reasonable alternative.

I may advert, in the first place, to the expressions which have been more than once used by learned judges, that not only must the alternative offered be reasonable per se, but that the two alternatives must be reasonable inter se. It has been said that the difference of rate may be so small as to be illusory, or so great as to make the higher rate a prohibitory one. I am not sure that I am able to follow the reasoning upon which this view has proceeded, but it is not necessary in the present case to pronounce any opinion upon it. The difference of rate here is 10 per cent., and it cannot, I think, be maintained that the difference is either so small as to be illusory or so great as to make the higher rate prohibitory.

It does not appear to be doubted by any of the learned judges who dealt with the case in the Court of Appeal, that but for the

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concluding words of the notice the decision must, on this part of the case, have been found in favour of the defendants. But the terms offered by the notice have been held unreasonable on two grounds. The first is, that the company undertake the risk of carriers at the higher rate up to the limit of £15 only in the case of neat cattle, and £2 in the case of pigs and sheep. This ground was not relied on by all the learned judges; and with deference to those who have expressed a contrary opinion, I am unable to see how the terms can on this account be pronounced unreasonable. The limit is that provided by the 7th section of the Railway and Canal Traffic Act; and if no such limit had been inserted in the notice the statute would have supplied it. It is true that the section provides for the declaration of a higher value and the payment of a reasonable percentage upon the excess value so declared by way of compensation for the increased risk, and that such percentage shall be notified in the manner prescribed by 11 Geo. 4 & 1 Will. 4 c. 68. But I can see nothing in the notice to exclude the statutory right to declare a higher value and thus obtain an increased liability on the part of the company, or to shew that the statutory requirements had not been complied with. All that the notice states is, that at the rate specified the company undertake the ordinary carrier's liability up to the limit of value specified in the statute. I cannot hold this to be unjust or unreasonable.

The other objection is a more serious one. It is said that the notice is unreasonable because the company intimate that they do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck. It is not easy to say exactly what was intended by these words, or what they mean; and if I thought that their effect was to exempt the company from liability when the disease was caused by the negligence of the defendants' servants as by undue exposure or when the animals, though able to walk from the truck, arrived in a damaged condition owing to such negligence, I should come without hesitation to the same conclusion as the Court of Appeal. But the question is what is the true construction of these words, read with their context. I think the case cannot be put more favourably for the plaintiff than to consider what construction ought to be put upon the language used,

supposing cattle to have been carried on the terms of the notice and to have arrived damaged by the negligence of the defendant's servants though able to walk from the truck, and that there were no statutory provisions limiting the free right of contract. Could the defendants in such a case have succeeded in claiming exemption from liability? If they could, I think the decision under appeal could be maintained. But after carefully weighing the able arguments addressed to us on behalf of the plaintiff I have come to the conclusion that on the true construction of the contract the company could not in such circumstances have established that they were exempt from liability. By the words which precede those under consideration the company in unambiguous and unequivocal terms undertake the ordinary risk of carriers, and I do not think the words which follow can be construed as cutting down or qualifying this clear undertaking. The earlier words having undertaken liability the company do not proceed to say "except in these particular cases" or that they "do not undertake liability" or "are to be exempt from liability" in such cases, but only that they "do not admit" liability. It appears to me that it would not be a sound construction to hold that the company by the use of such words as these had exonerated themselves from a liability which they had in another part of the same document in terms undertaken. The utmost effect that could properly be given to them, in my opinion, would be to say that whilst as regards animals not dying of disease or unable to walk from the truck the company admit that they are primâ facie liable, they do not admit such liability as regards animals dying of disease or able to walk from the truck on arrival. If this be the meaning I can see nothing unreasonable in it. It puts no unreasonable onus on the consignor. But whether this be the true meaning or not I feel satisfied that if the question had arisen in the manner I have suggested the Courts would not have held that it had the effect of exempting the defendants from liability for the negligence of their servants. It follows from what I have said that, in my opinion, the plaintiff was offered the alternative of having his cattle carried upon terms which I cannot do otherwise than adjudge to be just and reasonable.

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I have arrived at this conclusion solely on the construction of the document, uninfluenced by the consideration that the plaintiff's agent voluntarily signed a consignment note discharging the defendants from the liability he now seeks to impose. The legislature, as expounded by this House, has determined that though such a contract has been made the company may nevertheless be liable; and it is my function on the present occasion to administer and not to consider the expediency of the law. But I think it right to add that no injustice or hardship is inflicted on the plaintiff by the decision which I believe to be the correct one, for it cannot be doubted that he would equally have signed the consignment note even if the obnoxious words had not been added to the notice which has been the subject of so much consideration.

I have therefore to move your Lordships that the judgment appealed from be reversed and judgment in the action entered for the defendants, with costs, and that the respondent do pay the costs in the Court of Appeal and in this House.

LORD WATSON:—

My Lords, the provisions of the Railway and Canal Traffic Act of 1854 make it no longer possible for a railway or canal company, by means of a notice or declaration, however explicit, to exempt themselves from liability for the loss of, or injury to, animals or goods in their possession for the purpose of carriage, arising from their own or their servants' neglect or default. Every notice, condition, and declaration made or given by the company, with the view of limiting, in anywise, their responsibility for such neglect or default is declared to be null and void. In order to protect the company, the limitation of their liability must, in the first place, be made the condition of a special contract, signed by those interested in the animals or goods carried, or by the person delivering the same for carriage; and in the second place, the condition must be "adjudged by the Court or judge before whom any question relating thereto shall be tried, to be just and reasonable." The onus of shewing that the condition is just and reasonable rests upon the company. These are points arising upon the construction of sect. 7 of the Act of 1854,

and they have been conclusively settled by the judgments of this House, in *Peek* v. *North Staffordshire Railway Company* (1) and *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (2).

In the present case, the agents of the respondent, who delivered his cattle to the City of Cork Steam Packet Company for conveyance from Cork to Bristol, signed a special contract, by which they undertook to relieve the appellant company from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of their servants. It is admitted that the injuries sustained by the respondent's cattle, in the course of their passage over the appellants' railway were occasioned by the neglect or default of the appellants' servants, but it is not alleged, or proved, that these servants were guilty of wilful misconduct. Accordingly the whole controversy between the parties to this appeal depends upon the character of the condition inserted in the special contract. The appellant company do not dispute that it is incumbent upon them to satisfy the Court that the condition was just and reasonable.

Whether a condition of that kind is just and reasonable, is not a question of law, but a question of fact, or, it may be, a mixed question of law and fact, which must be determined according to the special circumstances of the contract in which it is inserted. It would, in my opinion, be highly inexpedient, even if it were practicable, in disposing of the present or any similar case, to attempt to define ab ante all the possible circumstances which will make such a condition just and reasonable, as between the company and the person contracting with them for carriage. The effect of sect. 7 is not that the condition is necessarily unreasonable, but that it is to be deemed to be so unless the contrary appear, or is established to the satisfaction of the Court.

In justification of the special condition exempting them from liability for the neglect or default of their servants, the appellant company maintain that the respondent had the alternative offered to him of having his cattle carried by them at an ordinary and reasonable rate, they accepting the ordinary liability of common

(1) 10 H. L. C. 473. (2) 8 App. Cas. 703.

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carriers. The respondent disputes both the existence and the reasonableness of the alleged alternative; and the only substantial question presented in the able arguments at the bar was, whether, in point of fact, a reasonable alternative was offered and was available to the respondent.

The consignment note, or, in other words, the special contract which was subscribed by the respondent's agents, Thomas Sheedy & Sons, bears on the face of it a distinct statement that the company carry cattle at two different rates, the one an ordinary rate with the ordinary liability of carriers, and the other a reduced rate at owner's risk. The agent, who actually subscribed the note, and was in the habit of signing similar notes, states in his evidence that he "never saw any rate but the one;" and his father, with whom he is in partnership, also says that he "never heard of there being two rates." Although I have great difficulty in giving credit to their statements, I am willing to assume that these persons never read, or if they did read, paid no attention to, the terms of the consignment notes which they were in the habit of signing every Friday. But it is impossible to say, even on that assumption, that they had not due notice that the appellants were ready and willing to carry their cattle, without limitation of liability, for a higher rate than that which they were paying. Whether they did or did not take the trouble to inform themselves, they must be taken to have known the terms of their own contract; and, if so, they must be taken to have known that the appellants, at the time when they contracted, did offer to carry the cattle at carrier's risk. That is, in my opinion, sufficient to cast upon the respondent the onus of shewing that the alternative rate offered to his agents had, as he maintained in argument, no real existence.

In the office of the Cork Steam Packet Company, where the consignment note was issued to and signed by the agents of the respondent, there had been uniformly exhibited, from and after the year 1881, a notice setting forth the terms upon which the company were ready to carry cattle at the higher rate. It is proved by Mr. Stanton, the appellant company's agent at Cork, that "after two trials of it, shippers ceased to go at a higher rate." How far that circumstance can affect the reasonableness

of the rate I shall consider hereafter. Meantime I content myself with the observation that Mr. Stanton's evidence does not imply that the rate had been withdrawn by the company, but that shippers had ceased to avail themselves of it, because they preferred the lower rate.

The notice contains the terms upon which the appellant company professed their willingness to carry accepting the liability of carriers. The amount of the rate is not given in figures; but it is stated to be 10 per cent. above the reduced or owners' risk rate which was paid for the respondent's cattle. The reduced rate, plus 10 per cent., is proved to be within the maximum rates authorized by the company's special Acts; and therefore it must, in my opinion, be taken to be in the circumstances of this case, a charge reasonable in amount. In *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (1) I said: "Primâ facie I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shewn to be in certain circumstances unreasonable, but I think the à priori presumption is in favour of its reasonableness." As that observation has been criticised by the learned Chief Baron, I shall endeavour to explain the meaning which it was intended to convey. A rate sanctioned by Act of Parliament is a legal rate, which the company can exact from all who employ them to carry, unless they have disabled themselves from making the charge, by conceding terms unduly favourable to some of their customers. Until it is shewn that they cannot lawfully charge the statutory rate, it must, in my opinion, be regarded not only as lawful but as reasonable. I do not think a Court of law would be justified in entering upon an inquiry for the purpose of ascertaining whether the legislature had authorized an unreasonable rate, and without such an inquiry it would be manifestly unjust to hold that it was unreasonable. In *Peek* v. *North Staffordshire Railway Company* (2) the alternative rate which this House found to be unreasonable was not authorized by statute; it was an arbitrary charge fixed by the company with reference to the supposed liability of marble work to deterioration during its transit by rail. I venture to think that the noble Lords who

(1) 8 App. Cas. 715. (2) 10 H. L. C. 473.

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decided that case would have hesitated to impugn the reasonableness of the alternative rate if it had been within the maximum approved by both Houses of Parliament on report of their respective committees.

It was argued, however, that, although the higher rate is in itself reasonable, the two rates must nevertheless be reasonable inter se; or, in other words, that the alternatives offered to the public will cease to be reasonable whenever the lower rate for carriage at owner's risk is so small in amount as to induce all consignors of cattle to adopt it. That argument found favour with the learned Chief Baron, who seems to have thought that the fact proved by Mr. Stanton that, after two trials, consignors ceased to send their cattle at the higher rate, afforded evidence of its unreasonableness. But I cannot assent to the proposition that a rate involving the ordinary liability of carriers, which would be lawful and reasonable in the absence of a lower rate at owner's risk, becomes unreasonable because consignors invariably prefer the lower rate. The natural tendency of all consignors is to select the lower rate whenever, in their estimation, the deduction is sufficient to cover the risk which they undertake. Even if the deduction were more than sufficient for that purpose, I cannot understand why that should make the higher rate unreasonable. It may afford an inducement to the consignor to elect the lower rate, but it cannot in my opinion, be justly characterised as a compulsitor to do so. The circumstances of this case are very different from those of *Peek* v. *North Staffordshire Railway Company* (1), where the compulsitor consisted in fixing the higher rate at an amount unwarranted by statute and per se unreasonable.

The Court of Appeal have decided against the appellant company, mainly on the ground that the company's risk rate is clogged with conditions which limit the common law liability for neglect or default which they profess to undertake. By the terms of the notice the company intimate that in consideration of the higher rate they "undertake the ordinary risk of carriers in respect of rail transit up to the following limits: neat cattle a sum not exceeding £15, pigs and sheep a sum not exceeding

(1) 10 H. L. C. 473.

£2, but do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck."

The pecuniary limits of liability specified in the notice are simply those which are fixed by sect. 7 of the Railway and Canal Traffic Act 1854. The notice does not set forth or refer to the relative provisions of that clause which empower the consignor to enlarge these limits by declaring the value of his live stock at the time of their delivery, the carriers being in that case entitled to charge a reasonable percentage on the excess of the declared over the statutory sum, provided they have duly notified such percentage or increased rate in the manner prescribed by 1 Will. 4, c. 68. The omission of a reference to the powers thus conferred by statute upon the consignor cannot, in my opinion, have the effect of making the statutory limit absolute, or of depriving the consignor of his right to take advantage of these provisions if he chooses to do so.

The concluding part of the notice, which relates to animals either dying of disease or able to walk from the truck on arrival at their destination, is a curious piece of composition, and its meaning and effect were very fully discussed in the arguments addressed to us. The undertaking of the company, to bear the ordinary risk of carriers, including of course all risk of loss or injury occasioned by their own or their servants' neglect, is expressed in terms absolute and unqualified, and that undertaking cannot, I apprehend, be cut down or impaired by subsequent conditions unless these are expressed in terms plain and free from doubt. It cannot be presumed that the appellants meant to adject conditions inconsistent with the liability which they had previously undertaken for damage arising from the fault of themselves or of those for whom they are responsible.

There are two classes of animals for which the appellants intimate that they do not admit liability, the first being animals dying of disease, and the second those arriving at their destinations in such condition as to be able to walk from the truck. Had the intimation been confined to the first of these classes, the construction of the sentence would have been free from difficulty. In my opinion the words "an animal dying of disease" mean an

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animal whose death is owing to natural causes and not to the act or default of any person. It appears to me, however, that animals arriving in such a condition as to be able to walk from the truck, may include animals suffering from injuries occasioned by the neglect or default of the company's servants.

I therefore read the words "arriving at destination in such condition as to be able to walk from the truck," as applicable not only to diseased animals but to cattle which have received injury during their journey by rail through the neglect or default of the appellants' servants; and the question then arises how are the words "do not admit liability," to be construed? It was maintained for the respondent that they are equivalent to notice that the appellants do not "undertake" any liability for such injured animals and therefore constitute an illegal exception from the risk of neglect or default previously undertaken. That argument appears to me to attribute to the words "do not admit" a meaning which they do not naturally bear and were not intended to convey. A notice that the company do not admit liability is not the same thing as a notice that it is a condition of their carrying cattle that they are not to be subject to liability in the cases specified. It is a notice that in these cases they will not admit, but, on the contrary, will dispute their liability, or, in other words, that they will not pay until it is shewn to their satisfaction or established that the cattle were injured through the neglect or default of their servants.

It was suggested that in that view of the meaning of the words they amount to a threat that the appellants will litigate every claim made against them in respect of cattle able to walk from the truck. Even if that were the case it does not appear to me to be a necessary consequence that a rate which in the absence of such an intimation would be lawful and reasonable is thereby made unlawful or unreasonable. The object of the intimation is not unintelligible. Cattle in the condition described may be removed from the railway premises without a word being said as to their having been injured, and a claim subsequently made, the honesty and validity of which the appellants have no proper means of testing. They have the right to dispute such claims whenever they are made; and I do not think it is wrong or

contrary to law that a company should inform senders of cattle that these claims when made will not be admitted until satisfactory evidence is produced. I see no reason to doubt that the intimation was made in good faith, and it does not appear to me that the respondent has any real cause to complain of the information given him. The case might have been very different if it had appeared that the company were using threats for the purpose of driving timid consignors to adopt the lower rate at owner's risk.

I have only to add, that although the question as to the reasonableness of the condition may with propriety be described as a jury question, yet it must always, in my opinion, be decided by the Bench. When it arises in the course of a jury trial it appears to me that the question is not within the province of the jury; because the legislature has expressly enacted that it shall be determined by "the Court or judge," and the jury is neither the one nor the other. I think that in such a case the presiding judge is bound to decide upon the evidence before him and to direct the jury accordingly; and that he is not entitled to ask the jury to find the facts which he may consider it necessary to ascertain in forming his own judgment.

Being of opinion that the condition in the special contract has been shewn to be just and reasonable, I think the appellant company are entitled to the judgment which has been proposed.

LORD BRAMWELL:—

My Lords, the plaintiff in this case entered into an agreement with the defendants that they should not be liable to him if his cattle were damaged through the negligence of their servants. They have been damaged through such negligence, yet the plaintiff says the defendants are liable to him, because he says the agreement that they should not be liable for their servants' negligence was unjust and unreasonable. He says, true, indeed, he got a valuable consideration for giving up their liability, but that he had no option in the matter. He says he had no option of having his cattle carried with full liability, for that the defendants only offered him the choice of two alternatives, the one which he took, and another which provided that they

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should not be liable if the cattle died of disease on the journey, or could walk out of the truck on its arrival. He says, therefore, that being offered only two alternatives, neither of which he was bound to accept, he is not a volunteer nor a free agent, and therefore cannot be said to have voluntarily accepted, nor consequently to have entered into, a just and reasonable agreement.

I say the plaintiff says all this. In truth, I dare say he says nothing of the sort. He certainly did not say it till the case got to the Court of Appeal. I dare say that the plaintiff was advised to bring his action, and that somehow (to quote Barry L.J.) he would be able to "wriggle" out of his agreement. I agree with the Lord Justice that it is shocking that such attempts are so often successful. It is an instance of the mischievous operation of a law which avoids an agreement voluntarily entered into. It is an invitation to dishonesty. But for that respect which every judge ought to have for the opinion of his colleagues, I believe the judgment of Barry L.J. would have been for the defendants. There is really nothing unreasonable in such an agreement as is relied upon. I will not repeat what I said in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (1). It is one of the bad consequences of the unfortunate construction put on the statute. Here is a man who for years constantly has sent his cattle at a reduced fare and reduced liability, with a full knowledge of what he was doing, and having had for years the benefit of the reduction in charge, seeks to wriggle out of the bargain he made. I am of opinion that he is not entitled in point of law to do so.

With great respect to the judges of the Court of Appeal, I think their judgment cannot be supported. In the first place, the plaintiff knew nothing of the notice which he says improperly limited the responsibility of the company when carrying at carrier's risk. He cannot say, therefore, that only two alternatives were offered to him, neither of which he was bound to accept. If he did not like the alternative which he accepted he should have inquired what was the other. He voluntarily, therefore, accepted the offer made him. I have said he got an equivalent. I do not understand it to be disputed that he got

(1) 8 App. Cas. 703.

an equivalent. If it is, I find it as a fact against the plaintiff. And I do so, not because *I* know anything of cattle carrying, but because *he* does, and for years and time after time has availed himself of sending his cattle at owner's risk.

But, further, if the plaintiff did not like the terms of owner's risk, he should have insisted on his cattle being carried at carrier's risk, disregarding the notice. It was said that he could not have enforced this, because the defendants are not common carriers of cattle. I cannot see why they are not. The notice relied on would not prevent it. It will be a strange consequence of *Peek* v. *North Staffordshire Railway Company* (1) that railway companies, not common carriers, but receiving what they like, cannot regulate the terms on which they will receive. Suppose an elephant was brought to them to carry, must they be liable for their servants' negligence in its carriage notwithstanding their refusal to carry unless it was agreed they should not be?

But, further, I cannot read the clause not admitting liability as it has been read in the Court of Appeal. What was meant by the author of the foolish thing, I know not, perhaps a limitation of liability. But the question is not what was meant, but what was said. And I declare I think the right meaning is the natural meaning, viz., in the case of animals dying of disease on the journey, or being able to walk out of the truck at the end, liability is not admitted, *it must be proved.* I am not sure this was not intended. Anyhow it is what is said, and I see no reason for altering the natural meaning. If so, it is rather a good thing for the public, as admitting by implication liability in all but the excepted cases. It does not affect the bargain, but at the utmost what is to be proved.

Still further, if it is not the same point. Suppose cattle were consigned at carrier's risk, and suppose the consignor knew of the notice, and suppose cattle died on the journey from disease contracted through defendants' negligence,—an ingenious suggestion, though not very practical,—or suppose cattle injured by negligence could walk out of the truck; surely the consignor might say, I care not what you admit, you are liable. Would it not be true? I think it would.

(1) 10 H. L. C. 473.

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If the clause means no liability it is either void or not. The argument is that it is wrong, and therefore the plaintiff was not bound to agree to it. But if wrong, it was null, and so unimportant.

Finally, I am called on to say that the clause in the contract which the plaintiff entered into was not just and reasonable. That is a matter of fact. I am satisfied it was both.

I cannot agree that the notice of a limit of liability for cattle, horses, and swine is objectionable. It does not preclude insurance, but applies when there is none. I think the judgment should be reversed.

LORD FITZGERALD:—

My Lords, I concur in opinion with my noble and learned friends that the contract which the plaintiff entered into with the defendant company was a just and reasonable contract.

The operation of the statute is, that no general notice given by the company shall be valid in law for the purpose of limiting their common law liability, but such liability may be limited by terms expressed in a signed contract such as shall, in the opinion of the Judge or Court, be just and reasonable.

The cattle were shipped at Cork by Thomas Sheedy & Sons, a Cork firm representing the plaintiff.

Thomas Sheedy, the father, stated he had been forty-five years in this shipping trade, but on cross-examination, says, "Never *heard* of there being two rates." I cannot for one moment trust this statement, or believe it to be accurate, but must conclude that Mr. Thomas Sheedy forgot what he had been doing every week (probably for years past), signing consignment notes of cattle, stating "the company have two rates for the conveyance of cattle." His son, John, is more cautious. He says "I never *saw* any rate but the one. I sign almost every Friday consignment notes." What he calls a consignment note is the special contract with the company containing a statement of the two rates (the ordinary or risk rate and the reduced rate), and by which the shipper requires the company "to receive and forward the cattle to be carried at the reduced rate." If Mr. Sheedy the elder and his son were, as they allege, ignorant of the two rates,

it is because they failed to use their eyes, or to make any the least inquiries on the subject; and no doubt if, since 1880, they had asked any of their principals at which of the two rates they should send their cattle, the answer would have been, of course, "At the lowest, we'll take our chance."

It was urged that there was really no alternative rate of which the shippers had notice at which they could ship at the risk of the company. This allegation seems to me to be unfounded in fact. The shippers well knew the reduced rate, and the notice posted in 1880, which continued to be posted in the office to at least the commencement of this action, expressly stated that "the company's risk rate is 10 per cent. over and above the before-mentioned owner's risk rate," but Mr. Stanton has proved that "after two trials shippers ceased to go at the higher rate." That is to say, they deliberately adopted the reduced rate, and ceased to make any inquiries about the other.

The decision of the Court of Appeal seems to have rested very much on the concluding passage of the notice posted in the company's office, viz., "but do not admit liability for any animals dying of disease, or arriving at destination in such condition as to be able to walk from the truck."

Thus the Lord Chancellor of Ireland observes upon it: "How can such a rate, with the addition of such a term, be regarded as a reasonable alternative? It lay upon the defendants to prove a just and reasonable alternative, unshackled by illegal and void conditions." And his Lordship's judgment seems very much, if not entirely, to rest on that foundation. FitzGibbon L.J. says that "the notice when produced contained two fatal conditions;" and the judgment of Naish L.J. is in accordance with the Lord Chancellor's.

I have some difficulty in reading the judgment of Barry L.J. otherwise than as in effect a dissent, though he formally assents to the decision of the Court. He says, inter alia: "I have had considerable doubts about the case, and frankly confess my reluctance to let a man escape from the consequences of his solemn and deliberate contract, into which he has entered with as much knowledge of its legal effects and its possible result as any man in this Court. The cattle dealers enter into these

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contracts voyage after voyage, regardless of any alternative, simply availing themselves of the lower rate, putting money thereby into their pockets so long as the chance is favourable, but then when casualties occur they seek to wriggle out of their engagement by all the technicalities afforded by the Railway and Canal Traffic Act."

I may observe that no judge on the Irish Bench has had more experience of such cases than the Lord Justice. He adds: "I would be disposed to be of opinion that this contract per se on the face of it affords evidence of two things, viz., an unreasonable condition on the part of the company, and an offer by them of a reasonable alternative." And when he comes to deal with the "fatal conditions," he adds: "I feel great reluctance to decide against the company upon this notice. It was never, according to his own evidence, seen by the plaintiff or his agent. If it were seen, it would not in the least have affected his volition in adopting the low rate."

I concur in the Lord Justice's reasons so far as I have stated them, and the case stands shortly thus. There were three rates: 1. The statutable maximum rate; 2. The company's risk rate, which was substantially less than the parliamentary rate; 3. The owner's risk rate, which was 10 per cent. lower than the company's risk rate.

The cattle dealers must be taken to have known the parliamentary rate. They did know what the reduced or owner's risk rate was, and they did know, or could without any difficulty have ascertained, that the alternative rate offered was 10 per cent. above the owner's risk rate.

Messrs. Sheedy & Sons, who are to be identified with the plaintiff, having the fullest knowledge or means of information, and having from week to week and from year to year adopted for their principals, and obtained the pecuniary benefits flowing from, the reduced rate, now turn round and allege that this special contract is unreasonable and unjust, and does not afford sufficient protection from being unjustly dealt with. In my opinion the allegation is entirely unfounded.

There remains to be considered the concluding provisions of the alternative which are said to be "fatal and illegal," and to

have rendered void the company's offer to accept the carriers' risk at common law.

I do not think it necessary to pause on the limitation as to the value of neat cattle; that was satisfactorily disposed of in the Exchequer Division, and by my noble and learned friend (Lord Watson); but as to the "do not admit liability," &c., these words do not seem to import any exception or exemption out of the previous "undertake the ordinary risk of carriers," nor could they have that operation. As carriers of cattle the company may be liable for the loss of animals dying on the journey. If, receiving an animal alive, they deliver a dead carcase at the end of the journey they are primâ facie liable, but if the animal died on the journey from disease, which may have been contracted before it was received by the company, then the company may or may not have incurred responsibility, and all that the notice asserts is: in such a case we do not admit liability, we leave that to be determined on the facts. It seems to me to be very harmless, so innocuous as not even to shift the onus of proof, and certainly not open to be described as a "fatal condition."

The remaining term of the notice, "or arriving at destination in such condition as to be able to walk from the truck" is somewhat more difficult of explanation.

It does happen that cattle having to come a long journey by sea and land, such as from Cork to Colney Hatch, arrive in such a condition as to be unable to rise, or if raised, to walk, and have to be slaughtered. In such a case there is primâ facie a liability on the carrier; but he has the opportunity of examination and of shewing that the condition of the cattle did not arise from any cause for which the carrier is responsible. There is another state of facts to be provided for, viz., where the cattle on arrival are "able to walk from the truck," and be delivered to and removed by the owner or consignee. In such cases and to guard themselves against subsequent claims which they may have but small means, if any, of investigating, the carriers say, "We do not admit liability, you must establish it." The same criticism applies to this as to the other cases; "do not admit" does not amount to any exception, exemption, or condition affecting ultimate responsibility.

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The judgment which I delivered in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (1) was made the subject in the Exchequer Division of criticism which I do not think it useful to answer or to observe upon. I adhere to the opinion I expressed in that case, which receives ample confirmation in your Lordships' present judgment.

The principal ground on which the judgment of the Exchequer Division rested was practically abandoned in the Court of Appeal, and has not been argued at your Lordships' bar. It is unnecessary, therefore, to observe upon it.

I agree that the order appealed from should be reversed.

Order appealed from reversed; judgment to be entered in the action for the defendants, with costs; the respondent to pay the costs in the Court of Appeal, and the costs of the appeal to this House; cause remitted to the Exchequer Division in Ireland.

Lords' Journals 14th Feb. 1887.

Solicitors for appellants: *R. R. Nelson, for J. & C. Ambrose, Dublin.*

Solicitors for respondent: *Williamson, Hill, & Co., for E. A. Beytagh, Dublin.*

(1) 8 App. Cas. 703.

[HOUSE OF LORDS.]

GEORGE BAKER AND OTHERS . . . . APPELLANTS; H. L. (E.) 1887 Feb. 14.

AND

THE OWNERS OF THE "THEODORE H. RAND". . . . . } RESPONDENTS.

THE "THEODORE H. RAND."

Ship—Collision—Liability for infringing Regulations—Regulations for preventing Collisions at Sea, Arts. 14, 22—*Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85) *s.* 17.

A ship failing to obey one of the Regulations for preventing collisions whereby a collision occurs is not to be deemed to be in fault within the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) s. 17, if the circumstances were such that a competent seaman exercising reasonable care could not have discovered that the regulation was in fact applicable.

Of two sailing ships approaching one another the S. was running free and the T. was close-hauled on the port tack. It was therefore the duty of the T. to keep her course in accordance with arts. 14, 22 of the Regulations for preventing collisions at sea (1884), but those navigating the T., in the belief that the S. was close-hauled on the starboard tack, ported, whereby a collision occurred:—

Held, affirming the decision of the Court of Appeal, that since with ordinary skill and by the exercise of reasonable care those navigating the T. could not have ascertained that the S. was running free, the T. was not to be deemed to be in fault within the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) s. 17.

APPEAL from a decision of the Court of Appeal in an action in rem brought by the appellants against the *Theodore H. Rand* for damage arising out of a collision. The owners of the *Theodore H. Rand* counter-claimed for damages.

The following statement of the facts is taken from the judgment delivered by Lord Herschell.

The appellants in this case, who are the plaintiffs in the action, were the owners of the *Statesman*, a brigantine of 150 tons register, which was sunk whilst on a voyage from South Shields to the Isle of Wight, owing to a collision with the respondents' vessel, a full-rigged ship of 1198 tons register, called the *Theodore H. Rand*.

The collision took place between 4 and 5 on the morning of

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the 3rd of February 1884 about five miles to the S.W. by S. of Beachy Head.

All the crew of the *Statesman*, except one man who was below at the time of the collision, were drowned. It was therefore impossible to call any witness from that vessel to speak to her manœuvres prior to the disaster.

The master, mate, and several of the crew of the *Theodore H. Rand* were called as witnesses. Their story was as follows:—That the *Theodore H. Rand* was close-hauled on the port-tack heading E., the wind being light from the N.N.E. That the weather was dark and hazy. That the red light of the *Statesman* was seen about half a point or a point on the starboard bow of the *Theodore H. Rand* about half to three quarters of a mile distant. That the red light was watched, and as it kept open the helm of the *Theodore H. Rand* was for a short time put hard-a-port. That this brought the *Statesman's* red light about two points on the port bow of the other vessel. That the green light of the *Statesman* was then seen, and almost immediately afterwards the collision occurred, the stem of the *Statesman* coming into contact with the port bow of the *Theodore H. Rand.*

Upon the trial before Butt J. he pronounced the *Theodore H. Rand* alone to blame. This judgment was reversed by the Court of Appeal (Baggallay L.J. Sir J. Hannen and Lindley L.J.) who were of opinion that there was no sufficient evidence to establish blame on the part of either vessel.

Against this decision the present appeal was brought.

July 19, 20, 22, 1886. Sir *R. Webster* Q.C. and *C. Hall* Q.C. (*A. E. Nelson* with them) for the appellants, contended (inter alia) that the *Statesman* was running free; that the *Theodore H. Rand* (being close hauled) had infringed arts. 14 and 22 of the Regulations for preventing collisions at sea in porting when she should have kept her course (1); that she must therefore "be deemed to be in fault" under the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) s. 17, and that it was no answer to say that those navigating the *Theodore H. Rand* could not have discovered that the *Statesman* was running free; and referred to *The*

(1) For Regulations of 1884, see Order in Council, 9 P. D. 247, 253.

Khedive (1). They also contended that independently of the Statute and Regulations the *Theodore H. Rand* was (upon the evidence) guilty of negligence.

Finlay Q.C. and *Baden Powell* (Sir *W. Phillimore* with them) for the respondents contended that the evidence shewed that those navigating the *Theodore H. Rand* believed and were justified in believing that the *Statesman* was close-hauled on the starboard tack; that in that belief the *Theodore H. Rand* in porting was acting rightly and in accordance with arts. 14 and 22 of the Regulations, and that she was therefore not to be deemed to be in fault under the statute. They also contended that it being doubtful upon the evidence whether the *Statesman* was running free or close-hauled the question upon the Regulations did not arise; and that the *Theodore H. Rand* was not guilty of negligence.

Sir *R. Webster* Q.C. replied.

The House took time for consideration.

Feb. 14, 1887. LORD HERSCHELL (after stating the facts as above given, proceeded as follows:—)

My Lords, the most important question argued before your Lordships was whether those navigating the *Theodore H. Rand* had infringed any of the Regulations for preventing collisions at sea, and must therefore be held to blame. It was contended that they had infringed arts. 14 and 22. The *Statesman*, it was said, was running free, whilst the *Theodore H. Rand* was close-hauled; it was, therefore, the duty of the *Statesman* to keep out of the way of the *Theodore H. Rand*, and the duty of the latter vessel to keep her course, and as she admittedly had not done so, but ported, she must be held to be in fault.

There was no question that the *Theodore H. Rand* was close-hauled, but there was some controversy at the Bar on the part of the respondents whether the *Statesman* was running free. The Court of Admiralty and the Court of Appeal both came to the conclusion that she was running free, and I see no reason to think that their conclusion was incorrect. This being so, there

(1) 5 App. Cas. 876.

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can be no doubt that the *Theodore H. Rand* did, in point of fact, fail to obey the rule. The appellants contend that this is enough to establish her liability, and that it matters not whether those who were navigating her knew, or had the means of knowing, that they were infringing the rule.

I am of opinion that this view cannot be supported. In the case of *The Beryl* (1) the present Master of the Rolls used the following language in relation to the Regulations for preventing collisions at sea: "When you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the conduct of people as to unknown circumstances. When you instruct people, you instruct them as to what they ought to do under circumstances which are, or ought to be, before them. When you say that a man must stop and reverse, or, I will say, slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact that there was risk of collision, if the circumstances were such that he could not know there was risk of collision. I put some instances during the argument to shew that that was so. . . . How can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose that you could regulate their conduct, not with regard to what they can see, but to what they cannot see. Therefore the consideration must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable."

I entirely concur in the view thus expressed, and adopt the language of the learned judge.

The next question that arises is whether those in charge of the *Theodore H. Rand* ought to have known that the *Statesman* was running free, or, in other words, whether they could, with ordinary skill and by the exercise of reasonable care, have ascertained what the fact was. Upon this the Courts below have differed in their conclusions. The question is of course most material, for the allegation on the part of those navigating the *Theodore H.*

(1) 9 P. D. 137, 138.

Rand is that they believed the other vessel to be close-hauled, and therefore ported, whereas, if she was not only in fact running free, but could have been ascertained by them to be so, there can be no doubt as to their default.

Butt J. (and I gather that the Trinity Masters agreed with him) was of opinion that the officers of the *Theodore H. Rand* might and ought to have seen that the *Statesman* was not close-hauled. The Court of Appeal took a different view, and were advised by the nautical gentlemen who assisted them that there was not sufficient evidence to shew that, by the exercise of any reasonable care and diligence on the part of the *Theodore H. Rand*, it could have been ascertained that the *Statesman* was running free and was not close-hauled.

We are invited to adopt the view taken by the learned judge and his assessors in the Admiralty Court, and reject that taken by the Court of Appeal. It is, of course, not sufficient for the appellants to establish, even if they could do so, that it might have been discovered by extraordinary care or skill that the *Statesman* was not close-hauled; it is incumbent upon them to prove that a competent seaman exercising reasonable care would have discovered it. Now, upon a review of the facts deposed to in evidence, the skilled nautical assessors who assisted the Court of Appeal have come to a conclusion on this point adverse to the appellants. I think it would be a strong measure, in the face of this opinion, for your Lordships to hold that those in charge of the *Theodore H. Rand* exhibited in this respect a want of reasonable care or skill. And I am not satisfied that they did so.

[LORD HERSCHELL then discussed the appellants' contention that, independently of the point above decided, the *Theodore H. Rand* had, as a matter of fact upon the evidence, been negligently navigated, and concluded as follows:—]

Under these circumstances I am not prepared to advise your Lordships to reverse the judgment of the Court of Appeal and pronounce the respondents to blame on the ground that the chief officer of their vessel was guilty of the negligence imputed to him. Although I feel the weight of the appellants' argument, I do not think the facts upon which it must rest have been so clearly established that it would be safe to found a judgment

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against the respondents on the case now set up for the first time at the bar of your Lordships' House.

Upon the whole, therefore, I move that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

LORD BRAMWELL:—

My Lords, I have been favoured with a copy of the opinion of my noble and learned friend who has just addressed your Lordships, and I entirely agree in his reasoning and in his conclusion.

LORD FITZGERALD (after stating the facts, proceeded as follows:—)

My Lords, has it been established on the part of the *Theodore H. Rand* that it was *impossible* for the officer of that ship, under the circumstances in which he was placed, and by any amount of care and diligence, to ascertain the true position of the *Statesman*, and that she was not close-hauled, and was running free?

This was the question which was so very much pressed on us on behalf of the *Statesman*, and it depends on the proper inference to be drawn from the evidence of Knowlton, the chief officer of the *Theodore H. Rand*.

On the most careful examination of his statements, I have not been able to see that he is not entitled to credit, and I have come to the conclusion, though with considerable hesitation, that it was not practicable for him to have ascertained the position of the *Statesman*. He judged erroneously that she was close-hauled, but the question is, are the owners of the *Theodore H. Rand* responsible for this error?

Upon this point of the case, it seems to me to be desirable that your Lordships' reasons should be so expressed as to leave no opening for the supposition that the ship may not be liable for an error in judgment of the officer in charge, even where that officer acted bonâ fide according to the best of his judgment and under circumstances of difficulty. The *Statesman* not being to blame, the onus was then cast on the owners of the *Theodore* to shew that she was not to blame.

Baggallay L.J. rather reverses the position, when he says: "I have come to the conclusion that there is not sufficient evi-

dence in this case to shew that, by the exercise of any reasonable care or diligence on the part of those on board the *Theodore H. Rand*, the actual course which the *Statesman* was pursuing could have been ascertained." The learned Lord Justice places the onus of proof on the *Statesman*, and in using the flexible term "reasonable" leaves an opening for misconception.

Lindley L.J. deals with this part of the case somewhat more fully, and is reported to have said: "The conclusion was wrong, and therefore what the *Theodore H. Rand* did was wrong, and that raises the real difficulty, or what I have felt all throughout to be the real difficulty in the case. But the exigency of the statute is very strict, and we must have regard to the statutory enactment, which is the 17th section of the 36 & 37 Vict. c. 85, and although the language of it is very wide, I cannot construe that section as applying to a case where a man acts perfectly bonâ fide, and makes a mistake for which he is not in any way morally to blame. The position of affairs was this—I am stating the conclusion at which I have arrived from the evidence—that the persons on board the *Theodore H. Rand* could not by any amount of reasonable diligence have ascertained what the course of the other ship was, whether she was free, or whether she was, as they supposed, close-hauled on the starboard tack. It seems plain, when one comes to investigate these rules, that such a state of things might arise. Then if a man is not in a position to find out what the other ship is doing, if he cannot with reasonable diligence find it out, and happens to make a mistake, is he to be made liable under the terms of the 17th section? I think so to construe the 17th section would be erroneous."

The language imputed to the Lord Justice is too wide, and seems to be capable of misinterpretation, especially in the passage where he says that the statute does not apply "where a man acts perfectly bonâ fide, and makes a mistake for which he is not morally to blame." If the application of the statute was to be excluded in such a case, its wholesome operation and effect would be seriously limited.

I can well conceive many instances in which the master of the ship, acting bonâ fide and according to the best of his skill and judgment, commits an error for which he may not be morally

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responsible, and yet the owners of his ship would be answerable for the consequences.

It seems to me that the statute intended to exclude considerations of mere mistake, error of judgment, and the like, and to lay down a very rigid, though not inflexible, rule.

The language of the 17th section of the statute is: "If, in any case of collision, it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation *necessary*."

There were no circumstances shewn to make a departure from the regulation necessary. The *Statesman* obeyed rule 14 by taking the proper manœuvre to keep out of the way of the close-hauled ship the *Theodore H. Rand*, and the question seems rather to be on the construction of art. 22 whether the *Theodore H. Rand* violated or broke that rule.

The 22nd article is, "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

The *Theodore H. Rand* did not keep her course. It seems, however, hard and unreasonable to affirm that the 22nd article was violated by the master of the *Theodore H. Rand* if it was impossible for him to ascertain that the 14th article was applicable, and if in the critical emergency which was thus forced on him he took the step which the crisis seemed, in his judgment, imperatively to demand.

Butt J. puts the matter thus, and I think with accuracy: "The mistake on the part of the port-tacked ship *brought about* the collision because the other was acting rightly." "I have to apply this statutory rule. I would not apply it against a port-tacked ship if I thought it were *impossible*"—your Lordships will observe that he uses the word impossible—"for her officer to tell what he had to deal with."

The *Statesman* was not to blame. The *Theodore H. Rand* caused the calamity. It lay on her owners to establish that she was not to blame, by clear and satisfactory proof that it was

impracticable for the officer in charge, using his utmost care and diligence, to make out the situation he had to deal with in relation to the *Statesman*, and that, being placed in circumstances of great difficulty, he had acted to the best of his skill and judgment.

After much hesitation I have come to the conclusion that the owners of the *Theodore H. Rand* have established that position in evidence, and that their ship consequently was not to blame.

LORD HERSCHELL :—

My Lords, my noble and learned friend Lord Ashbourne, who took part in the hearing of this appeal and is unable to be present to-day, has asked me to state that he has perused in print the judgment which I have delivered this morning and that he entirely concurs in it.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 14th February 1887.

Solicitors for appellants : *Lowless & Co.*
Solicitors for respondents : *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

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THE OWNERS OF THE CARGO OF THE "KRONPRINZ" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE "KRONPRINZ" RESPONDENTS.

THE "ARDANDHU."

Ship—Limitation of Liability—Claim against Fund in Court—Discontinuance—Estoppel—Res Judicata—Res inter alios acta.

An action having been brought by the owners of ship K. against the owners of ship A. for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," and an order in those terms was drawn up in the Admiralty Registry. The owners of the cargo of ship K. having afterwards brought an action against the owners of ship A. for damages arising out of the same collision, both ships were held to blame, and the cargo owners were held entitled to half their damages. The owners of ship A. having obtained a decree limiting their liability and having paid a sum into Court, the cargo owners filed their claim in the limitation action. The owners of ship K. having afterwards with the consent of the owners of ship A. obtained a rescission of the order for discontinuance, claimed against the fund in the limitation action. The cargo owners having objected to this claim:—

Held, affirming the decision of the Court of Appeal (11 P. D. 40), that the agreement and order for discontinuance (upon their true construction) did not amount to a release of all claims, and that the owners of ship K. were not precluded from claiming against the fund.

The Bellcairn (10 P. D. 161) distinguished.

APPEAL from an order of the Court of Appeal (1).

A collision having occurred between the ships *Kronprinz* and *Ardandhu*, the owners of the *Kronprinz* brought an action for damage in the Admiralty Division against the owners of the *Ardandhu*. No proceedings having been taken beyond writ and appearance, on the 1st of May 1883 an agreement, headed in that action and signed by the solicitors for both parties was drawn up as follows: "We Lowless & Co. for the defendants hereby consent to this action being discontinued without costs on the ground of

(1) 11 P. D. 40.

inevitable accident." On the 2nd of May an order was made in the Admiralty Registry as follows:—"Upon consent of both solicitors, it is ordered that this action be discontinued, without costs, on the ground of inevitable accident."

In June the owners of the cargo of the *Kronprinz* brought against the owners of the *Ardandhu* an action for damage arising out of the same collision. In December 1884 this action was tried before Sir J. Hannen, who found both vessels to blame and held the plaintiffs entitled to recover half their damages from the defendants.

The owners of the *Ardandhu* having in January 1885 brought an action for limitation of liability, Butt J. in March gave judgment limiting their liability to £8 a ton, and a fund was paid into Court. On the 24th of June the owners of the cargo of the *Kronprinz* filed a claim for half their damages, which exceeded the fund in Court.

On the 30th of June 1885 Butt J. on the application of the owners of the *Kronprinz* and after hearing the solicitors for the owners of the *Ardandhu* made an order rescinding the order of the 2nd of May 1883. The owners of the *Kronprinz* having afterwards filed a claim for damages against the fund in Court in the limitation action, the registrar made his report allowing the claim. On objection to the report it was confirmed by Sir J. Hannen, whose decision was affirmed by the Court of Appeal (Lindley and Lopes L.JJ., Lord Coleridge C.J. doubting) (1). Against this decision the present appeal was brought.

Sir *Walter Phillimore* (*C. Stubbs* with him) for the appellants:—

The order discontinuing the action by the owners of the *Kronprinz* was a bar to any action by them or other mode of enforcing their claim against the *Ardandhu*. It was founded upon a bargain between the respective owners of the *Kronprinz* and the *Ardandhu* that the collision should be treated as an inevitable accident and that no further action should be brought or claim made by either against the other. There was abundant consideration for this bargain, not only in the abandonment of costs but in the fact that though the *Kronprinz* was the greater sufferer the loss of the

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Ardandhu was substantial, being afterwards estimated in the limitation action at more than £5000.

A mere discontinuance under Order XXVI. r. 1 does not bar another action for the same cause, but this is not a mere discontinuance. The words "on the ground of inevitable accident" would not naturally appear in the order, and being there they manifest the intention of the parties that there should be a mutual release of all claims. It may have been a rapid and careless mode of doing business, but neither party then thought of getting out of the order. The bargain was carried out in the form of an order under Order LII. r. 23 which gives a filed agreement of the parties the same effect as an order made by the judge.

[LORD HALSBURY L.C.:—If the parties meant all you contend for why did they not say "the action is dismissed," instead of "discontinued?"]

The agreement was no doubt drawn up in a slip-shod form; but if they meant no more than a simple discontinuance why did they insert the words "on the ground of inevitable accident?" As Lord Coleridge C.J. points out it is not likely that the parties would take the trouble and go to the expense of making such an agreement and getting the order drawn up in order to avoid the very trifling costs of the writ. The costs of doing all that would be more than the costs of the writ. The only real consideration therefore must have been the mutual release. The case is on all fours with *The Bellcairn* (1), the only distinction being formal, not substantial, viz.: that in that case there was a judgment, here there is an order that has the same effect. The owners of the *Kronprinz* and *Ardandhu* had no right to rescind the order so as to put in the claim of the *Kronprinz* to the prejudice of the appellants. What the motives of that rescission were is matter of conjecture, but it appears from the registrar's report that the claim of the cargo owners being more than the limited liability of the *Ardandhu*, the *Ardandhu* was not prejudiced by the claim of the owners of the *Kronprinz*. The only persons prejudiced are the appellants, who will receive less if the respondents' claim is admitted. The respondents say that if they

(1) 10 P. D. 161.

chose to rescind their own order they could do so, notwithstanding the appellants' objection, because their own order is res inter alios acta. But that argument was urged in *The Bellcairn* (1) and rejected by the Court of Appeal. It was there held that a judgment could be set aside (if at all) only by the Court itself with full knowledge of the facts, and that the Court would certainly not rescind a judgment to the prejudice of third parties; and Cotton L.J. adds that "any party interested in the subject-matter of a judgment has a right to set it up as being a good answer to a claim between the immediate parties, even though, as here, these do not choose to rely on it."

Charles Hall Q.C. and *J. Gorell Barnes* for the respondents were not heard.

LORD HALSBURY L.C.:—

My Lords, this appeal turns upon a somewhat narrow question, namely, what is the meaning of the agreement between the parties and what is the effect of the order which purported to carry it out. Those are the only materials from which to ascertain what the agreement between the parties was. I can find no clue to what the object of the parties was except in those two documents. But it is important to observe that the parties entering into the arrangement were the two solicitors, who must be taken to be familiar with the effect and meaning of the forms which they were using. It being conceded that as matter of law the form which they adopted was one which allowed all matters to be open and did not conclude the rights of the parties, the question of the form which they used becomes very material in construing their meaning. It would have been easy to have said that "this action should be dismissed;" and if they had said that, it is admitted that as between these two parties a bar would have been created which would have prevented any further proceeding. But they deliberately (for people must be supposed to intend the reasonable consequences of their acts) adopted language which can only be used if it is

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the intention of the parties to leave themselves at large so as to reassert their rights if they please. Sir Walter Phillimore has not contested that that must be the ordinary and natural meaning of the words; but he relies upon the language which is added to the order, but which properly speaking forms no part of an order to discontinue, namely, the reason which the parties gave for consenting to that course, that is to say, that it was on the ground of inevitable accident. I am not able to conjecture with any reasonable degree of certainty for what purpose those words were used. Various reasons have been suggested, and I think others might occur to one; but the question for your Lordships is whether, when the bargain between the parties and the form which they adopted lead to the inference that so far as the instrument itself is concerned it was intended to leave the parties free to bring a fresh action or to do that which is equivalent to bringing a fresh action, namely, to make this claim, your Lordships are to assume that they intended that that should not be done. I am unable to come to any such conclusion. It seems to me that the plain and obvious inference which is to be drawn from this instrument is that the parties intended that which is the plain construction of the language which they have used, and as there is nothing to cut down that construction I assume that that is what they have meant; and inasmuch as that is the real meaning of the bargain in fact entered into between the parties it appears to me that it is competent for the owners of the *Kronprinz* to make this claim.

For these reasons, the matter being an extremely simple and short one, I move your Lordships that this appeal be dismissed and the order of the Court of Appeal affirmed, with costs.

LORD BRAMWELL:—

My Lords, I am of the same opinion. If the claim of the *Kronprinz* against the *Ardandhu* is in existence, the owners of the *Kronprinz* have a right, as it seems to me, to share in the fund which has been brought into Court. If it is not in existence, of course they have no right to do so. That reduces the question to this, Is the claim in existence? It is said that it is

not; partly, as I understand, by the effect of the order of discontinuance. I can see nothing in the order of discontinuance which, by what you may call its intrinsic effect, would bar a claim of the owners of the *Kronprinz*.

But then it is said that there was a bargain between the parties which is embodied in that order, and that the bargain is operative to prevent the owners of the *Kronprinz* claiming against this fund. As I have said, that can only be because that bargain has extinguished the right. But has it? We have not the slightest evidence of any agreement between the parties that the claims on the one side should be given up in consideration of the claims on the other being given up. One might make a guess that it was in the contemplation of the parties, but I am by no means sure that it was. For I am by no means sure that they may not have thought it just as well for them to keep silent and not to go on litigating a matter which might have disastrous results to both of them. But supposing that there was such a bargain, that bargain has been rescinded by them, as it was open to them to do. If it had been a bargain the effect of which was to extinguish a debt at the time, I do not say that they could have rescinded it; but if it was not such a bargain as that, but an executory one only, then of course they could rescind it. What I mean is, that if all that was done was that if an action was brought there was to be an application to an equitable jurisdiction to stay the action, I should doubt very much whether that would extinguish a debt. But be that as it may, in the first place I do not find that there was any such bargain, and in the next place any such bargain, if ever entered into, was rescinded by parties competent to rescind it. I cannot see, therefore, any evidence to shew, or any ground for saying, that either the claim of the *Kronprinz* on the *Ardandhu* or of the *Ardandhu* on the *Kronprinz* was extinguished. If so, it seems to me that the respondents had a right to make that claim against this fund.

In *The Bellcairn* (1), what was really decided was that the judgment was a bar to any further claim being made or to the same claim being made over again, that the judgment having been

(1) 10 P. D. 161.

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pronounced by the Court it was res judicata, and that the claim was gone. Of course, therefore, it could not be set up against the fund. That was the distinction between that case and this; there the claim had ceased to exist, here it has not.

LORD HERSCHELL:—

My Lords, I am entirely of the same opinion. Sir Walter Phillimore was driven to admit that he could not establish his case unless he could shew that the respondents had in fact released all their claims against the *Ardandhu;* because he was compelled to admit that an order for discontinuance does not of itself operate as a release or an extinguishment of the claims, or in any other way bar further proceedings, But he contended that from the document signed by the solicitors, and from the order itself, we were to infer an agreement between the parties that there should be a mutual release of the claims of the one against the other. What evidence have we of any such agreement? Sir Walter Phillimore relied on the use of the words "on the ground of inevitable accident." I will concede, for the purpose of the argument, that those words do point in the direction of such an agreement; but then it is impossible to shut one's eyes to the fact that the rest of the language used and the form which the transaction took point as strongly, and as it seems to me much more strongly, in the other direction, namely that the parties have adopted a means of carrying out the object in view which primâ facie imports, whether you look at the terms of the agreement or at the order itself, that there shall not be a bar; because not merely does the fact of the plaintiff discontinuing not operate in any way as a bar, but the judge's order to discontinue—unless it were made a condition of the discontinuance that no other action should be brought—would not operate as a bar.

Under these circumstances, and looking at the two documents as a whole, whatever speculation one may enter into as to what the parties had in view, it seems to me that it would be utterly impossible for us out of those documents to spell an agreement such as alone would establish the case of the appellants before your Lordships' House. I therefore entirely concur in the judgment which has been proposed.

LORD MACNAGHTEN :—

My Lords, I also entirely agree. It appears to me that on the face of the documents there is nothing equivalent to a release, and from the materials before your Lordships' House I am unable to infer anything of the kind.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 15th February 1887.

Solicitors for appellants: *Stokes Saunders, & Stokes.*
Solicitors for respondents: *W. A. Crump & Son.*

[HOUSE OF LORDS.]

AIREY AND ANOTHER . . . . . APPELLANTS;

AND

BOWER AND OTHERS . . . . . RESPONDENTS.

Will—Power created after Will—Appointment by General Bequest—Contrary Intention—7 Will. 4 & 1 Vict. c. 26, ss. 23, 24, 27.

A testatrix, who had a general power of appointment over the A. property, by her will in 1854 after specific devises and bequests devised and bequeathed the residue of her estate to X. By a deed-poll in 1855 she appointed the A. property upon such trusts as she by deed or her last will "should from time to time or at any time thereafter direct or appoint," and in default of appointment upon trust for Y. The testatrix died in 1857:—

Held, affirming the decision of the Court of Appeal, that reading together sects. 24 and 27 of the Wills Act 1837 (7 Will. 4 & 1 Vict. c. 26), the will operated as an exercise of the power given or reserved by the subsequent deed-poll and passed the property to X.

Boyes v. *Cook* (14 Ch. D. 53) approved.

Semble, that the case also fell within sect. 23 of the Wills Act, and with the same result.

APPEAL from a decision of the Court of Appeal.

A settlement made in 1831 assigned leasehold premises, called the Albion property, to trustees upon trust to pay the rents and profits to Isabella Bower during her life, and after her decease

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to hold the premises upon such trusts as she by deed or by her last will should from time to time or at any time thereafter appoint, and in default of appointment upon certain trusts.

By her will made in July 1854 Isabella Bower after devising certain lands and bequeathing certain legacies devised and bequeathed all the rest, residue, and remainder of her estate and effects whatsoever and wheresoever to her four children (one of whom was A. S. Airey) in equal shares as tenants in common absolutely.

In April 1855 Isabella Bower by deed-poll (which recited the settlement of 1831) appointed the Albion property (subject to her own life estate) as follows:—

"Upon and for such trusts, intents and purposes and under and subject to such powers, provisoes, declarations and agreements as the said Isabella Bower, whether covert or sole, by any deed or deeds or by her last will and testament in writing or any codicil or codicils thereto in writing, or any writing in the nature of or purporting to be her last will and testament or a codicil thereto, shall from time to time or at any time hereafter direct or appoint, and in default of and until such direction or appointment, and so far as no such direction or appointment shall extend, Upon and for the trusts hereinafter declared and contained concerning the same (that is to say) as to one equal fourth share thereof, Upon trust for" her son A. S. Airey during his life; and after his decease, Upon trust for his children who should attain the age of 21 years, if more than one, in equal shares as tenants in common. The disposition of the other three-fourths need not be referred to.

An action having been brought against the respondent Bower (trustee of the settlement of 1831) claiming (inter alia) administration of the trusts of the deed-poll of 1855, the question was whether the will of 1854 operated as an exercise of the power given by the deed-poll of 1855. If it did, the deceased A. S. Airey took an absolute fourth share in the Albion property and under his will the respondent Brooks took a moiety of such share. If it did not, the deceased A. S. Airey had only a life interest in this one-fourth share, and his children (two of whom were the appellants) took this one-fourth share under the deed-poll, and the respondent Brooks took nothing.

Upon further consideration Pearson J. declared that the will of 1854 operated as a valid exercise of the power of appointment given or reserved by the deed-poll of 1855, and that the respondent Brooks was entitled to one moiety of A. S. Airey's fourth share of the Albion property, and made an order accordingly.

This order was affirmed on appeal by the Court of Appeal (Lindley, Fry and Lopes L.JJ.), upon the principle of *Boyes* v. *Cook* (1). Against this decision the present appeal was brought.

Feb. 17, 18. *Montague Cookson* Q.C. and *MacClymont* for the appellants:—

The question is whether the will of 1854 operated as an exercise of the power of appointment given by the deed of 1855. It is admitted that if the will had been executed after the deed-poll of 1855 the will would have been a good execution of the power of appointment, for this is the effect of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 27, which enacts that a general devise shall include all property over which the testator had a general power of appointment. But it is said that though executed before the deed-poll it still has that effect by virtue of sect. 24, which enacts that every will shall as to the property comprised in it speak and take effect as if it had been executed immediately before the testator's death. This argument ignores the words of the deed-poll which created the power:—"shall from time to time or at any time *hereafter* appoint." The word "hereafter" and the whole of the clause which points only to futurity shew the intention that only a will to be executed after the deed-poll should operate. Both sect. 24 and sect. 27 are expressly subject to the qualification "unless a contrary intention shall appear by the will." Here a contrary intention does appear. It must be remembered that the testatrix was the author as well as the donee of the power and knew when she executed the deed-poll that she had made the will. It is not as if the donor and donee of the power were different persons. *Boyes* v. *Cook* (1) is relied on by the respondents, but that decision is distinguishable, and if not should be overruled. The present case is stronger than that, for the word "hereafter" did not occur in that case:

(1) 14 Ch. D. 53.

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moreover if the will there had not operated as an exercise of the power it would have had no operation whatever, for the donee of the power had no other property. That is not the case here: the testatrix possessing other property besides the Albion. The two instruments in that case could not have stood together: here they can.

In Sugden on Powers (8th ed.) p. 306 Lord St. Leonards (apparently speaking of a will made *after* the appointment by deed) says "Where the property is settled by the testator himself upon others in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power." The present case is à fortiori, the will being before the deed. This passage was, it is true, reflected on by James and Cotton L.JJ. in *In re Clark's Estate* (1), but those observations were only dicta not necessary to the decision. The passage from Sugden is cited in 1 Jarman on Wills p. 685 (4th ed.) and the author adds, "Although the Act requires that, to be effectual, the intention not to execute the power shall appear *by the will*, that cannot mean to the exclusion of the instrument creating the power. The will, if it is to exercise the power, becomes part of the instrument creating the power, and both must be read together to collect the intention truly. This must be borne in mind when the question is whether by the combined operation of sects. 24, 27 a general power is exercised by a previously executed will." If the intention of the deed-poll of 1855 is looked at there can be little doubt what the testatrix meant.

[LORD MACNAGHTEN:—Sect. 23 enacts, "that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." Why is not this case within that section?]

(1) 14 Ch. D. 422, 431.

This is a new point, not suggested in either of the Courts below. One answer to it is that the deed-poll of 1855 recites the power to appoint by deed or will and then exercises the power by deed, thus exhausting the power and revoking (if necessary) so much of the will as was inconsistent with the deed. The intention to revoke may be collected from the scope of the deed: *Ford* v. *De Pontes* (1).

[LORD HERSCHELL:—Sect. 23 says "revoked as aforesaid;" that is in the manner pointed out in sects. 18, 20, marriage, burning, tearing, or destruction, "or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed."]

Another and conclusive answer is that the power was exhausted by the deed, and as the will only speaks from the death as to the property comprised in it, the execution of the power by deed would have left nothing for the will to operate upon, but for the fact that the deed itself created a power to appoint by will. Sect. 23 therefore cannot have the effect of causing the antecedent will to supersede the subsequent deed.

Sir *Horace Davey* Q.C. *Everitt* Q.C. and *Hamilton-Humphreys* for the respondent Brooks, and *Cozens-Hardy* Q.C. and *Lorence Ryland* for the respondent Bower, were not heard.

LORD HALSBURY L.C.:—

My Lords, if this matter were res integra I should feel no difficulty. Whatever construction (to use the words of Fry L.J.) might be put upon the language of the deed of 1855 "by an unlearned person," the question of the making of wills at one time, and the operation of them afterwards upon the death of the testator (because of course a will only operated upon the death of the testator), had been a subject of considerable discussion and had raised questions of difficulty and sometimes of great hardship; and the legislature, with the express view of getting rid of such questions, created the perhaps somewhat artificial system that a general power of appointment should be treated as

(1) 30 Beav. 572, 594.

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the property of the testator—and that the will should not only operate but speak from the death of the testator.

Taking together those two sections, the 24th and the 27th, it seems to me impossible to contest that this lady's will does that which the legislature enacted that it should do, and speaks from the date of her death and exercises the power, which was created, no doubt, after the will, but which, under the combined operation of those sections, undoubtedly seems to me to effect that for which the respondents have contended.

I have said that if this were res integra I should have felt no difficulty. But the question is not new, and looking at the course of decisions, not only in *Boyes* v. *Cook* (1), but in earlier cases, and having regard to the learned judges who have decided substantially the point which is before us, I should hesitate very long before coming to a conclusion different to that which they have arrived at.

Another point has been suggested by my noble and learned friend (Lord Macnaghten), and I confess that at present I cannot see an answer to it. That point is on the 23rd section. I do not desire to found my judgment upon the 23rd section, because it was a point that appears to have taken the Bar rather by surprise and it has not been fully argued before us. I only wish to say, had it been necessary to decide this case upon the true construction of that section as applied to the facts of this case, I should have come to the same conclusion that I have come to upon the 24th and 27th sections.

It is enough, however, for your Lordships' judgment at present to determine the case on the ground on which it was determined by the Court of Appeal. Therefore upon that ground I move your Lordships that this appeal be dismissed and the order of the Court of Appeal affirmed, with costs.

LORD HERSCHELL :—

My Lords, I entirely agree in the opinion which my noble and learned friend has just expressed. If the matter came before us now for the first time I should entertain no doubt that the combined operation of sects. 24 and 27 was that which has been

(1) 14 Ch. D. 53.

attributed to them by the Court of Appeal. I do not propose to give any reasons for that conclusion. I am content to rest my opinion entirely upon the reasons which have been given both by the learned judges in this case in the Court below and by other learned judges who in previous cases have arrived at the same conclusion. If the matter were even doubtful I should hesitate very long before, unless compelled to do so, I laid down a different rule of construction in relation to sections of the Wills Act, which have had for many years a particular construction given to them; because it is impossible to say how many persons may have acted upon the faith that that construction was correct, and rested the disposal of their property upon that belief. Of course if it were clear that the construction put by the Courts upon the sections was wrong, it would be our duty, disregarding the result, to express a contrary opinion. But I have no hesitation in following the opinions which have been previously expressed and resting my judgment exclusively upon them.

With regard to the operation of the 23rd section, at present I do not see the answer to the point which was put by my noble and learned friend opposite (Lord Macnaghten) to the learned counsel for the appellants. It seems to me that the present case comes within the very words of the 23rd section, and giving the best attention to the attempt made to take the case out of the words of the section, I was unable to come to the conclusion that it succeeded. But I prefer to rest my judgment exclusively upon the construction of the 24th and 27th sections, because the point upon the 23rd section was apparently not raised in the Court below and we have not had the assistance of a full argument upon it or of the opinions of the learned judges in the Court below. But although I do not in any way rest my opinion upon it, yet I see no reason to doubt that the point is one which, if it had been necessary to determine it, would have been concluded in favour of the respondents.

LORD MACNAGHTEN:—

My Lords, I am entirely of the same opinion. As at present advised it appears to me that the 23rd section is an answer to the claim on the part of the appellants. But I desire not to rest my

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opinion upon that ground because it has not been fully argued. I am quite content to rest my judgment upon the foundation upon which the decision was rested in the Court of Appeal.

The effect of the 24th section of the Wills Act is to give to every will a continuing operation and to make it speak from a date immediately preceding the death of the testator. Taking that in conjunction with the 27th section, it appears to me that the will of Mrs. Bower was operative to pass this property.

This case is perhaps distinguishable from *Boyes* v. *Cook* (1); the words of futurity are more emphatic; but I think it would be very unfortunate if at this date the beneficial effects of the Wills Act were frittered away by such nice distinctions.

Therefore I agree with the motion which has been made by my noble and learned friend on the woolsack.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 18th February 1887.

Solicitors for appellants: *Kaye & Guedalla for Buckley & Mattinson, Oldham.*

Solicitors for respondent Brooks: *Johnson & Weatherall for Storer & Co., Manchester.*

Solicitors for respondent Bower: *Clarke, Woodcock, & Ryland, for Tweedale, Sons, & Lees, Oldham.*

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[HOUSE OF LORDS.]

ISAAC COOKE & SONS . . . . . APPELLANTS;

AND

HENRY DOUGLAS ESHELBY . . . . RESPONDENT.

H. L. (E.) 1887 March 15.

Principal and Agent—Contract with Agent for Undisclosed Principal—Set-off against Principal of Debt due from Agent—Estoppel.

Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account.

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew that L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief on the subject whether they made this contract on their own account or for a principal:—

Held, affirming the decision of the Court of Appeal, that C. could not in an action brought by the principal for the price of the cotton set off a debt due from L. & Co.

APPEAL from a decision of the Court of Appeal.

In April and June 1883 Livesey Sons & Co., cotton brokers at Liverpool, sold to Isaac Cooke & Sons, on the Liverpool Cotton Market, cotton for future deliveries. Livesey Sons & Co. made these two contracts in their own names, but were really acting as agents for Maximos, their undisclosed principal. Before maturity of the contracts Livesey Sons & Co. suspended payment, and under the rules of the Liverpool Cotton Association, Limited, the contracts were closed in the form of repurchases by Livesey Sons & Co. from Isaac Cooke & Sons. The price of cotton having fallen, the result of this transaction was that a sum of £680 was due from Isaac Cooke & Sons to Livesey Sons & Co. For this sum an action was brought against Isaac Cooke & Sons by Eshelby as trustee in the liquidation of Maximos who had failed.

The defendants by their defence claimed to set off against the plaintiff's claim money due from Livesey Sons & Co. to the defendants upon a general account.

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In answer to the plaintiff's interrogatories whether in the transactions sued on the defendants did not believe that Livesey & Co. were acting as brokers on behalf of principals the defendants said: "We had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals."

At the trial at Liverpool in February 1884 before Baggallay L.J. without a jury it was proved that Livesey & Co. bought and sold both for principals and on their own account, and that Cooke & Sons knew this. Baggallay L.J. held that the defendants were entitled to the set-off and gave judgment for them.

The Court of Appeal (Brett M.R. Lindley and Bowen L.JJ.) reversed this decision and entered judgment for the plaintiff for the amount claimed, on the ground that the defendants were not entitled to the set-off unless they had been induced by the conduct of Maximos the principal to believe, and did in fact believe, that they were dealing with Livesey & Co. as the principals.

Against this decision the defendants appealed.

1886. Nov. 30, Dec. 2. *W. R. Kennedy* Q.C. and *T. G. Carver* for the appellants:—

The facts support the defendants' claim of set-off. Livesey & Co. were undoubtedly principals on the face of the contract: there was nothing to suggest that they were acting as agents. In so contracting they were acting under the express instructions of their principal, Maximos, that his name should not be given. Treating Livesey & Co. as principals the defendants balanced their contract book accordingly and set off the gains against the losses upon all contracts, whether of sale or purchase, with Livesey & Co. If Maximos had been named the defendants would have had nothing to do with a contract in which he was the principal, not altogether because they were unwilling to take his name, but because it might destroy their chance of set-off with Livesey & Co. The defendants claim the right of set-off, not on the ground of estoppel, but on the ground of an equitable qualification on the right of the undisclosed principal to adopt the contract, the

qualification being that he cannot prevent the right of set-off if he instructs or allows his agent to contract as principal. To establish such a right it is not necessary to have a representation that the contracting party is the person solely interested: all that is necessary is a representation and belief that the buyer is entitled to deal with him as the principal. Once the authority is shewn by the principal to the agent to contract as principal, he may be safely treated as principal. The basis of the right to set-off is not belief or representation but authority. It is a mistake to suppose that in the factors' cases or any cases any representation is ever made that no one but the seller is interested.

Where a contract not under a seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue: but if the principal sues "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party:" *Sims* v. *Bond* (1). The defendant "is entitled to the same defence whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal:" *Isberg* v. *Bowden* (2); *George* v. *Clagett* (3): and see *Dresser* v. *Norwood* (4). It is not necessary to negative means of knowledge that the agent dealt as agent: *Borries* v. *Imperial Ottoman Bank* (5). Nor is it necessary to shew belief in the defendant that the agent was acting on his own account: *Stacey* v. *Decy* (6). It is enough to shew that the defendant had not the means of knowing and did not know that the agent was not acting on his own account: *Carr* v. *Hinchcliff* (7); *Purchell* v. *Salter* (8); *Semenza* v. *Brinsley* (9). It is true that in the latter case Willes J. said that the defendant must deal with the agent as, and believe him to be, the principal, but that was only a dictum not necessary for the decision. If the principal instructs or allows the agent to deal in his own name he can only sue subject to the right of set-off: *Moore* v.

(1) 5 B. & Ad. 389, 393.
(2) 8 Ex. 852, 859.
(3) 7 T. R. 359; 2 Sm. L. C. 8th Ed. p. 118.
(4) 17 C. B. (N.S.) 466.
(5) Law Rep. 9 C. P. 38.
(6) 2 Esp. 470.
(7) 4 B. & C. 547.
(8) 1 Q. B. 197.
(9) 18 C. B. (N.S.) 467, 477.

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Clementson (1); *Turner* v. *Thomas* (2); *Baring* v. *Corrie* (3); *Coates* v. *Lewes* (4); *Tucker* v. *Tucker* (per Parke B.) (5); *Browning* v. *Provincial Insurance Company of Canada* (6); *Maspons* v. *Mildred* (7).

Broadly, the principal's right to adopt the contract of his agent is subject to this, that he must in all respects stand in the shoes of his agent. It is a mistake to treat the factors' cases as if they were decided on the ground of estoppel. Secret instructions to the agent not to sell in his own name do not prevent the right to set-off: *Ex parte Dixon* (8) explaining *Semenza* v. *Brinsley* (9). To create estoppel there must be not only belief in a fact but representation of that fact: *Wilde* v. *Gibson* (per Lord Campbell) (10). The only representation a factor makes is that he has authority to sell and convey a good title to the goods. Estoppel is defined by Lord Selborne in *Citizens Bank of Louisiana* v. *New Orleans Canal and Banking Company* (11); see also *Farmeloe* v. *Bain* (12). The rule as to an undisclosed buyer is independent of estoppel: *Armstrong* v. *Stokes* (per Blackburn J.) (13); *Irvine* v. *Watson* (14).

The true view of the facts here is that Maximos did not intend to be a party to this contract, as shewn by his instructions. The mere fact that the contract was made for the benefit of some one does not make him a party to the contract: *Addison* v. *Gandasequi* (15).

D. French Q.C. and *Synnott*, for the respondent, were not heard, Lord Halsbury L.C. saying that notice would be given if their Lordships desired to hear them.

The House took time for consideration.

(1) 2 Camp. 22.
(2) Law Rep. 6 C. P. 610, 613.
(3) 2 B. & Ald. 137, 143.
(4) 1 Camp. 444.
(5) 4 B. & Ad. 745, 750.
(6) Law Rep. 5 P. C. 263, 272.
(7) 9 Q. B. D. 530, 543; 8 App. Cas. 874.
(8) 4 Ch. D. 133.
(9) 18 C. B. (N.S.) 467.
(10) 1 H. L. C. 605, 633.
(11) Law Rep. 6 H. L. 352, 360.
(12) 1 C. P. D. 445.
(13) Law Rep. 7 Q. B. 598, 607.
(14) 5 Q. B. D. 102, 414.
(15) 4 Taunt. 573; 2 Sm. L. C. 8th ed. p. 369.

1887. March 15. LORD HALSBURY L.C. :—

My Lords, in this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The appellants, the merchants with whom these contracts were made, knew the brokers to be brokers, and that it was their practice to sell in their own names in transactions in which they were acting only as brokers. They also knew that the brokers were in the habit of buying and selling for themselves. The appellants with commendable candour admit that they are unable to say that they believed the brokers to be principals; they knew they might be either one or the other; they say that they dealt with the brokers as principals, but at the same time they admit that they had no belief one way or the other whether they were dealing with principals or brokers.

It appears to me that the principle upon which this case must be decided has been so long established that in such a state of facts as I have recited the legal result cannot be doubtful. The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both those propositions, namely, first, the permission of the real principal to the agent to assume his character, and with reference to the fact whether those dealing with the supposed principal have in fact acted upon the belief induced by the real principal's conduct, various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great variety of judges for something more than a century. The cases are all collected in the notes to *George* v. *Clagett* (1).

In *Baring* v. *Corrie* (2), in 1818, Lord Tenterden had before him a very similar case to that which is now before your Lordships, and although in that case the Court had to infer what we have here proved by the candid admission of the party, the principle upon which the case was decided is precisely that which appears to me to govern the case now before your Lordships.

(1) 2 Sm. L. C. 8th Ed. 118. (2) 2 B. & Ald. 137, 144, 147.

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Lord Tenterden says of the persons who were in that case insisting that they had a right to treat the brokers as principals: "They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry." And Bayley, J., says: "When Coles & Co. stood at least in an equivocal situation, the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles & Co. sold them on their own account. And if so, they can have no defence to the present action."

I am therefore of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce nor did in fact induce that belief.

I now move your Lordships to affirm the judgment of the Court of Appeal and to dismiss this appeal with costs.

LORD WATSON:—

My Lords, Livesey Sons & Co. cotton brokers and members of the Liverpool Cotton Association, in April and June 1883 sold two parcels of cotton, for future delivery, to the appellants who were members of the same association. These sales were in reality made on account of one N. C. Maximos; but in accordance with his instructions they were effected by Livesey Sons & Co. in their own name and without any mention of a principal. Livesey Sons & Co. suspended payment on the 20th July 1883 at which date they owed the appellants a balance on general account. On the same day Maximos gave written notice to the appellants that both sales had been made by Livesey Sons & Co. as his agents. The present action was brought by Maximos, and is now insisted in by the trustee in his liquidation, for reco-

very of the sums due by the appellants in respect of these two purchases. There is no dispute as to the amount of the claim; the only defence pleaded by the appellants being that they are entitled to set off that amount against the balance admittedly due to them from Livesey Sons & Co.

The only facts which have a material bearing upon the appellants' defence are these. According to the practice of the Liverpool cotton market with which the appellants were familiar, brokers in the position of Livesey Sons & Co. buy and sell both for themselves and for principals; and in the latter case they transact, sometimes in their own name without disclosing their agency, and at other times in the name of their principal. In their answer to an interrogation by the plaintiff touching their belief that Livesey Sons & Co. were acting on behalf of principals in the two transactions in question, the appellants say: "We had no belief upon the subject. We dealt with Livesey Sons & Co. as principals, not knowing whether they were acting as brokers on behalf of principals or on their own account as the principals."

That is a very candid statement, but I do not think any other answer could have been honestly made by persons who, at the time of the transactions, were cognisant of the practice followed by members of the Liverpool Cotton Association. A sale by a broker in his own name to persons having that knowledge, does not convey to them an assurance that he is selling on his own account; on the contrary it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot, when the real principal comes forward, allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal and not as an agent in order to secure a right to set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has,

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in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent.

It was argued for the appellants, that in all cases where a broker, having authority to that effect, sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account. That was said to be the rule established by *George* v. *Clagett* (1); *Sims* v. *Bond* (2), and subsequent cases. It is clear that Livesey Sons & Co. were not mere brokers or middlemen, but were agents within the meaning of these authorities, and if the argument of the appellants were well founded they would be entitled to prevail in this appeal, because in that case their right of set-off had arisen before the 20th of July 1883, when they first had notice that Maximos was the principal.

I do not think it necessary to enter into a minute examination of the authorities, which were fully discussed in the arguments addressed to us. The case of *George* v. *Clagett* (1) has been commented upon and its principles explained in many subsequent decisions, and notably in *Baring* v. *Corrie* (3), *Semenza* v. *Brinsley* (4), and *Borries* v. *Imperial Ottoman Bank* (5). These decisions appear to me to establish conclusively that, in order to sustain the defence pleaded by the appellants, it is not enough to shew that the agent sold in his own name. It must be shewn that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen L.J. that it rests upon the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon

(1) 2 Sm. L. C. 8th Ed. 118.
(2) 5 B. & Ad. 389.
(3) 2 B. & Ald. 137.
(4) 18 C. B. (N.S.) 467.
(5) Law Rep. 9 C. P. 38.

a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.

I therefore agree with the conclusion of the learned judges of the Court of Appeal, and with the reasoning upon which it is founded. A broker who effects a sale in his own name with an intimation, express or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

LORD FITZGERALD:—

My Lords, the supposed importance of this case in its bearings upon the operations of the Liverpool Cotton Market appears to render it rather a duty that each of us should deliver his own judgment. But when we reach a correct appreciation of the facts of this case it seems to me that all difficulty disappears as to the application of the principle on which it ought to be decided. Although my noble and learned friends have concisely and accurately stated their views of the facts, I ask your Lordships' permission to advert to some parts of the evidence somewhat more in detail.

The third paragraph of the defence alleges that "the defendants believed that Livesey & Co. made the contracts as principals," which must be interpreted to mean that they so believed at the time the contracts in question were entered into. This essential averment has not been proved, and has been disproved. My noble and learned friend (Lord Watson) has already called attention to an answer given by the appellants which seems to become more pointed when we refer to the actual interrogatories in reply to which that answer was given. The fourth interrogatory was: "Is it not the fact that in the transactions mentioned in the statement of claim the defendants believed that Livesey & Co. were acting as brokers on behalf of principals?" The fifth interrogatory was: "Did the defendants believe that in such transactions Livesey & Co. were speculating and dealing on their own account as the principals?" To which the defendants answered:

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"To the fourth and fifth interrogatories, *that we had no belief on the subject.* We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals;" and it appears on the notes of the learned judge at the trial, that to some similar question Mr. Cooke, on his vivâ voce examination, answered: "I had no belief in the matter."

It is quite true that Messrs. Cooke had not at the time of the contract any actual knowledge that Livesey had a principal, but it is equally clear that they purposely abstained from obtaining information from Livesey on the subject. Messrs. Cooke relied on a custom in the Liverpool market that where the principal was undisclosed at the time of the contract he could only intervene and claim on the contract provided his doing so "was not to the detriment of the broker of the other contracting party;" or, to put it in the exact words of a question and answer at the trial: "(Mr. Carver): Then, my Lord, I will put this question: In the arrival market where one of the parties on the face of the contract fails, is there any custom which governs the right of undisclosed principals to claim upon the contracts made in the name of the party who has failed? (*A.*) He can only claim subject to the rights of the other party to the contract to take into account whatever differences there may be on other outstanding contracts." The special custom alleged to prevail in the Liverpool arrival market was not established in proof.

The disclosure at the time of the contract that there was an undisclosed principal would not alone have been very undesirable information to Cooke & Co., but would have prevented the contract being entered into, for in case of the failure of Livesey & Co. Messrs. Cooke could not (I am giving the language used in the course of the evidence) have "squared their books," that is, have applied the money due on the contracts to Maximos to discharge the liability of Livesey & Co. Mr. Tobin, one of the principal witnesses for the appellants (defendants), explains the objects to be achieved very clearly: "(*A.*) If I have a number of transactions with a broker I treat that broker as the dealer. He is called 'broker' technically, but practically he is the dealer or the contracting party with me. *I know nobody else in the trans-*

action. I have bought from him certain cotton, and I have sold to him certain cotton. I know how my account stands. If an undisclosed principal can come forward and claim on a certain portion of the contracts, those that are in his favour, and saddle me with the rest, my position is entirely altered." Mr. Tobin also says that unless there was such a rule as he had stated in a previous answer it would be impossible to carry on business in the Liverpool Cotton Arrival Market. He means of course that there would be difficulties in the way of carrying on such business in the manner in which it is carried on in that market. Whether that may or may not be so I do not know, nor shall I ventrue to speculate whether such a result would prove to be a mercantile calamity. We must not alter the law to suit the views or the convenience of the Liverpool Cotton Market.

The case at one time seemed to present a novel aspect which it might have been difficult for the plaintiff to encounter. It was alleged that Maximos authorized Livesey & Co. to contract in their own names, and also prohibited them from disclosing his name as principal, and this seemed to be close on the confines of an express authority to contract in their own names as principals and as if owners of the cotton. I put the case to Mr. Kennedy during the argument, but he did not seem to attribute any weight to it, and properly so, for on examining the evidence carefully it falls short of the allegation, and does not appear to have been relied on in the Court of Appeal or in the Court below. The evidence in this particular rests on two answers given by Mr. Tobin. In the one on direct examination he spoke as to a conversation with Maximos ten days before the trial and said: "*Mr. Maximos told me that he had instructed Messrs. Livesey not to give his, Mr. Maximos', name, in the arrival market, but to give his own, Livesey's, name.*" But on cross-examination he corrected that statement from a memorandum made at the time "as it was known that Livesey did business for him, but as other brokers came to him for business *he authorized Livesey not to give his name*, that is the reason he gave you for saying what you have said he said? (*A.*) Yes." This seems to me to fall short of authorizing Livesey & Co. to contract in their own names as principals.

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If Messrs. Cooke had asked Livesey, "Have you a principal in these contracts?" we may assume their answer would have been in the affirmative; and if further asked to name that principal they would have replied, "He does not wish us to do so." The ascertained facts appear to stand thus: Livesey & Co. were extensive cotton brokers on the Liverpool Cotton Arrival Market. They also dealt in cotton arrivals on their own account as principals. Their position was well-known to Cooke & Co. Maximos employed Livesey & Co. as brokers to sell for him the particular lots of cotton, and they did so, the contracts which they entered into, though in their own names, being in law contracts for and on behalf of Maximos. He also "*authorized* them not to give his name," which may be read as meaning not to give his name either in the contract notes or in answer to inquiries, his special object seeming to be to avoid the jealousies or solicitations of other brokers. He did not prohibit them from giving his name, nor did he give them any right to sell in their own names as principals, or as if they were the owners of the goods, and he did not arm them with the indicia of property if any such existed. Cooke and Sons having at their hand the fullest means of information abstained from making any inquiry as to whether Livesey & Co. were acting as brokers for a principal or on their own account as principals and owners, and they say "they had no belief on the subject."

Such being the facts I do not propose to criticise the numerous cases which *George* v. *Clagett* (1) gave rise to, or to enter on the consideration whether the head-note to that case is misleading. The head-note frequently is misleading if you read it alone and do not take the trouble to read the case. It seems to me that the judgment of the Master of the Rolls in the Court of Appeal is quite correct and supported by a number of authorities, including *Fish* v. *Kempton* (2); *Borries* v. *Imperial Ottoman Bank* (3), and the lucid passage from the judgment of Willes J. in *Semenza* v. *Brinsley* (4).

I concur with my noble and learned friend in adopting at once the decision and the reasons of the Court of Appeal. I

(1) 2 Sm. L. C. 8th Ed. 118.
(2) 7 C. B. 687.
(3) Law Rep. 9 C. P. 38.
(4) 18 C. B. (N.S.) 467, 477.

have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel in pais involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests, and it seems to me to be sufficient to say in the present case that Maximos did not in any way wilfully or otherwise mislead the defendants (Cooke & Sons) or induce them to believe that Livesey & Co. were the owners of the goods or authorized to sell them as their own, or practice any imposition on them. The defendants were not in any way misled.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 15th March 1887.

Solicitors for appellants: *Field, Roscoe & Co., for Harvey, Alsop & Stevens, Liverpool.*

Solicitors for respondent: *Andrew, Wood & Glasier, for Yates, Stananought & Johnson, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.) 1887 April 1.

JAMES DRUMMOND & SONS . . . . APPELLANTS;

AND

E. H. VAN INGEN & CO. . . . . RESPONDENTS.

Contract to manufacture Goods equal to Sample—Sale of Goods by Sample—Caveat emptor—Warranty of Merchantableness implied—Latent Defect.

Cloth merchants ordered of cloth manufacturers worsted coatings which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent and was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of cloths of that class:—

Held, affirming the decision of the Court of Appeal, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used.

Mody v. *Gregson* (Law Rep. 4 Ex. 49) approved.

APPEAL from a decision of the Court of Appeal.

The following statement of the facts and pleadings is taken from the judgment of the Earl of Selborne.

The respondents, in July 1883, ordered from the appellants, who are worsted cloth manufacturers at Bradford, certain goods, described in the contracts as "mixt worsted coatings," which were to be, in "quality and weight," equal to certain numbered samples, which the appellants had previously furnished to the respondents. The goods were of a class well-known in the trade under the denomination of "corkscrew twills." They were delivered to the respondents, whose object (known to the appellants) was to sell them to clothiers or tailors in the United States of America. All, or great part of them, were, in fact, disposed of to various customers of the respondents in the United States; but they were returned upon the respondents' hands, as not suitable for the purposes of that trade. They were afterwards sold by auction, at a loss; and an action (for the price of the

goods) having been brought by the appellants against the respondents, a counter-claim was made by the respondents to recover damages against the appellants, on the ground that the goods were not merchantable, as they ought to have been.

The goods were, in point of fact, made exactly in the same manner as the samples; and the defect alleged to exist in them, viz., that of "slipperiness" (or want of such cohesion in the texture of the cloth, between the warp and weft, as was requisite to prevent them from giving way under the strain of ordinary wear when made up into coats in the usual manner) existed equally in those samples.

The defence to the counterclaim was, in substance, that the goods were exactly what had been ordered; that there was no implied warranty that they should be merchantable for any purpose, for which goods of such a make and texture would not be fit; that goods of that particular make and texture were not wholly unsaleable, or incapable of being made up (if the tailor did his work in a manner suitable to their quality) into coats which might endure reasonable wear; that the defect, such as it was, was one of degree only, and was so far patent, that, by such examination of the sample as the manufacturer had a right, under the circumstances, to assume the merchant to have made, it might, and ought to, have been known.

An order having been made for the trial of certain preliminary issues in fact by Day J. without a jury before any of the other questions of fact, that learned judge found upon the issues as follows:—

1. That there was an implied warranty on the sale of the goods that the cloth should be merchantable generally as worsted coatings, and should be properly manufactured, and should be suitable to be made up into coats in the ordinary course of tailors' work. 2. That the plaintiffs did sell the cloth for the purpose of being made up into coats in the ordinary course of tailors' work. 3. That it was an express term of the contract of sale that the cloth should be efficiently woaded and dyed so as not to fade unduly. 4. That the cloth was not merchantable as worsted coating, and was not properly manufactured and suitable to be made up into coats in the ordinary course of tailoring, and

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was not efficiently woaded and dyed within the meaning of the contract. 5. That the cloth was sold by sample in the sense that it was to be similar to a sample produced in respect of weight and quality, and that the term "quality" covers strength as distinguished from rottenness in cloth, but the judge is not satisfied that the term quality has been ordinarily applied to such a defect as is alleged to exist in the cloth delivered under the contract, that is to say, slipperiness of weft under warp. 6. That the cloth did correspond with the sample. 7. That the sample was made to the defendants' order, and was seen and approved of by them as to pattern, colour, and generally as to handle. 8 and 9. That the defects both of structure and colour in the cloth and in the sample were latent, and were not apparent or discoverable upon such inspection as was ordinary and usual upon sales of worsted cloths of this class.

The Court of Appeal (Lord Esher M.R. and Fry L.J.) affirmed the findings of Day J. upon the ground that there having been a conflict of evidence the Court was not so well able to decide as the learned judge to which set of witnesses credit ought to be given and ought not therefore to overrule his finding. From this decision the present appeal was brought.

Feb. 28; Mar. 1, 3, 4, 7, 8. Sir *R. Webster A. G.* and *R. O. B. Lane* for the appellants, contended that the findings were wrong upon the evidence; that there was no such warranty implied by law; and that the defendants having bought the cloth for a particular purpose and a particular market, in reliance solely on their own and their agents' judgment as to its adaptability for such purpose and market, were precluded from setting up an implied warranty of the fitness of the cloth for any particular purposes.

Waddy Q.C., and *E. Tindal Atkinson* Q.C. (*Wilberforce*, with them) were heard for the respondents.

The House took time for consideration.

April 1. EARL OF SELBORNE:—

My Lords, it does not appear to me to be necessary for the decision of this case to consider whether the ground on which

the findings of Day J. on the principal questions in it were affirmed by the Court of Appeal, is one on which it would have been satisfactory to rest your Lordships' judgment; because I believe that, after full argument and after considering the effect of all the material parts of the evidence, your Lordships are of opinion that those findings are substantially right.

[After stating the facts and pleadings as given above, his Lordship proceeded as follows:—]

As to so much of this defence to the counter-claim as turns on the question of fact, whether the alleged defect in the cloth existed or not (by which I mean existed as a defect, causing coats made of it in the manner usual among clothiers and tailors to give way under a strain which goods of the same class, such as were generally known and used in the trade, ought to resist) I think your Lordships must, on the principle on which the Court of Appeal acted, take the existence of the defect, in a degree sufficient to render the cloth unmerchantable for the purposes for which goods of the same general class had previously been used in the trade, to have been sufficiently established. That question depended in part on practical demonstration by skilled witnesses in the presence of the Court, followed up and further verified by the judge himself. Of all possible kinds of evidence, this appears to me to be the most unfit for review by a Court of Appeal. So far, therefore, I think the fact must be assumed in the respondent's favour, on whom the burden of proof, upon that point, undoubtedly lay.

It remains to be considered, whether this was a defect of quality against which there was an implied warranty by the appellants, under all the circumstances of the case. That it was a defect of *quality* seems to me indisputable; and, if it was known to the respondents when they gave the order, or if (as between themselves and the appellants) they ought to be taken as having discovered, or as having had means which they ought to have used of discovering it from the samples, I should hold, that it was covered by the word "*quality*," as used in the contracts, and that there was no implied warranty against it. But if it was a latent defect, of which knowledge, or means of knowledge which ought to have been used, could not properly, under the circumstances,

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be imputed to the respondents, then I think that the word "*quality*" as used in the contracts, ought to be restricted to those qualities which were patent, or discoverable from such examination and inspection of the samples as, under the circumstances, the respondents might reasonably be expected to make; and that it cannot be extended to defects in the texture of the samples, rendering the cloth so manufactured unmerchantable for the purposes for which the order was given, of which such examination and inspection would give the merchants, practically, no notice.

I do not think it necessary to go into any of the cases which have been decided upon questions of this kind; I think it sufficient to say, that while the doctrine of implied warranty ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them, yet I think it does extend to such a case as the present, if the goods, being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended. If it would be unreasonable, on the one hand, to expect from the manufacturer a more exact knowledge than in the ordinary course of business would be likely to reach him of the processes and modes of treatment through which manufactured goods may pass, in the hands of the merchant or his customers, before being adapted to their ultimate uses, it would be not less unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business, and will use such methods as may be proper to produce a good article of the kind ordered. The burden of ascertaining beforehand that this can be done, or how it is to be done, does not rest upon him.

In the present case the defect arose out of the want of sufficient

connection or cohesion in the texture of the cloth between the warp and the weft. In all goods of the class called "corkscrew twills," the weft lies hidden inside, the surface on both sides being warp. Without the application of some kind of test, by pressure or otherwise, to discover whether the defect of "slipperiness" existed or not, or else unravelling the threads from the edges of the sample, there was nothing outwardly observable in the samples furnished by the appellants from which the defect could have been discovered. The appellants attempted, but in my opinion failed, to shew that it was customary, as to this class of goods, and in such a business as that of the respondents, to apply a test or tests for the purpose of detecting slipperiness; or that the respondents, as reasonable men of business, ought to have done so. There was, in point of fact, nothing to put the respondents on their guard against any such defect; and they had, in my opinion, a right to assume that the appellants, accepting the order, could and would produce and deliver a good article, having the weight and all the other apparent qualities of the samples, which would be as merchantable for coatings as other articles of the same class previously known in the trade. The evidence, especially that of Mr. Martin and Mr. Lodge (Appendix, pp. 100, 223–4, 227–8), which is to my mind confirmed by that of the appellants' witness Booth (Appendix, pp. 314, 315), leads me to the conclusion that this might have been done by the use of proper means. No such defect had been found before in any cloth of the same class previously manufactured; certainly not of such a kind and degree as to affect in the same, or in any other practical way, its merchantable character; and it appears that these particular samples, and the goods manufactured from them, were made with that particular arrangement and texture of warp and weft from which the defect arose, according to a design furnished by a very young man then in the employment of the appellants who was at that time little more than a beginner fresh from his apprenticeship, who did not himself discover the defect, and who admitted that, at that time, he knew nothing of any such danger as that of the cloth slipping.

The respondents had previously dealt with the appellants for cloth of the same general class, and had been supplied by them

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with goods in which there was no similar defect. When they gave the orders, embodied in those particular contracts, it is apparent that they wanted, not a worse, but in some respects (particularly as to what is called "handle," which I understand to be a certain softness to the touch) a better article than they had before. All the communications which passed between the parties were addressed to that point, as the result to be produced in the samples and in the manufacture; not to the manner of texture, or of uniting and connecting the warp and the weft, by which it was to be produced. At one time a sample was sent with a thicker weft, which would have cost more money, and was probably for that reason rejected. The same defect existed in that sample also; and the result ultimately arrived at was, that the desired softness of "handle" depended on the finish, and could be obtained in cloth of the thickness originally contemplated.

I do not think it necessary, in this state of circumstances, to express any opinion upon the question which might have arisen if cloth with the requisite softness of "handle" could not have been manufactured without having the defect in question. This was part of the contention of the learned counsel for the appellants; but if the findings of the learned judge at the trial depended upon the result of the evidence on that point, I am unable to differ from them.

As to colour, your Lordships stopped the respondents' counsel; and I think it enough to say that the finding of the learned judge on that point also is, in my judgment, one which ought not to be disturbed.

I move your Lordships to affirm the judgment of the Court below, and to dismiss this appeal with costs.

LORD HERSCHELL:—

My Lords, I think that the general principles of law which have to be applied to the facts of this case are well settled and beyond question. It was laid down in *Jones* v. *Bright* (1) that where goods are ordered of a manufacturer for a particular

(1) 5 Bing. 533.

purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision, and was not impeached by the learned counsel for the appellants. It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in *Jones* v. *Just* (1), where all the previous authorities on the point were reviewed. In the case of *Mody* v. *Gregson* (2), in the Exchequer Chamber, the decision in *Jones* v. *Just* (1) was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt. I proceed to consider its application to the facts of the case before us.

The plaintiffs were manufacturers at Bradford; the defendants were merchants dealing in woollen and worsted cloths, carrying on business in Huddersfield and New York.

The order for the goods in respect of which the present litigation has arisen was given by the defendants to the plaintiffs in 1883. The goods ordered were described as "worsted coatings," and they were to correspond in quality and weight with patterns which had been supplied by the plaintiffs. They were of a description known in the trade as "corkscrew," having the warp on either side and the weft not exposed to view. The goods, when delivered, were shipped to the United States, and sold by the defendants to various purchasers there. It turned out, as I think the evidence establishes, that owing to the mode of manufacture there was a great tendency in the warp to slip, and this to so serious an extent that when made into garments in the ordinary manner the seams gave way with no more than ordinary

(1) Law Rep. 3 Q. B. 197. (2) Law Rep. 4 Ex. 49.

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tension, and the braid became detached from the cloth. In consequence of this defect many purchasers from the defendants returned the goods to them, or compelled them to make allowances, for which they sought compensation by counter-claim in the present action. It is important to observe that the contract for 1883 was not the first dealing between the parties. The defendants had purchased of the plaintiffs a quantity of "corkscrew" worsted coatings in the previous year, and I cannot see any evidence in the correspondence which passed, or in the oral communications, to shew that it was intended by either of the parties to the contract of 1883 that the goods should be of a different character to those of the previous year in any particular material to the controversy which has to be determined in this action. It is true that the purchasers desired goods of a somewhat softer "handle"; but I think it is abundantly clear on the evidence that this was a matter of "finish," and that it was not the endeavour to give a softer "handle" which led to the defect of excessive slipping.

I have said that the goods were, by the order, to conform to certain patterns supplied by the plaintiffs to the defendants, and approved of by them. There is no doubt that the bulk of the goods corresponded in every particular with these patterns; and this, the plaintiffs allege, is a complete answer to the defendants' claim. The tendency to slip is not, they insist, properly to be called a *defect* but a *characteristic* of the manufactured article, which existed in the sample just as much as in the bulk of the goods. I do not think it is very material what name is given to it; but I confess it strikes me that a characteristic arising from a particular mode of manufacture which renders the manufactured article less useful for the purpose for which such an article is ordinarily used, without, as far as appears, any counterbalancing advantage, may well be called a defect.

I think it is proved by the evidence that this defect existed to such an extent that the worsted coatings could not be used for the purpose of being made into coats in the manner usual with goods of the same general description and quality, and that they could only be made into garments capable of resisting ordinary tension by the adoption of special precautions both in regard to

breadth of seam and method of sewing. The question arises whether, in these circumstances, the plaintiffs have complied with their contract by delivering coatings precisely corresponding in quality and weight with the patterns, or whether they are liable to the defendants.

Let me consider, first, how the case would have stood if no samples had been supplied. Suppose the defendants had simply ordered worsted coatings similar to those they had purchased in the previous year, but with a difference of colour, design, and handle. Could the plaintiffs have justified supplying under such an order coatings such as those which have given rise to this litigation? It is true that the purpose for which the goods were required was not, as in *Jones* v. *Bright* (1), stated in express terms, but it was indicated by the very designation of the goods, "coatings." I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think too that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature.

It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognisant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of "coatings" should know that they are to be turned into coats and other garments, and that he should further

(1) 5 Bing. 533.

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know what coatings will and what will not be capable of use for this purpose in the ordinary methods.

It seems to me not open to doubt that in the case which I have supposed the manufacturer would be liable. Does it then make any difference that the plaintiffs furnished patterns which were approved of by the defendants, and that the goods delivered were in complete conformity with their patterns? Except upon the assumption (with which I will deal presently) that the patterns ought to have conveyed to the defendants knowledge of the defect of which they complain, I cannot think that it does.

When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty.

I adopt what was said by Willes, J., in *Mody* v. *Gregson* (1): "The object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express. It seems difficult, therefore, to ascribe any greater effect to a sample in excluding implication than would be ascribed to express words in the contract giving, as far as words could give, the same amount of information; and as to such words, the doctrine that an express provision excludes implication, does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."

There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience. The inquiry, therefore, arises whether the defendants by "due diligence in the use of all ordinary and usual means" would have detected in the

(1) Law Rep. 4 Ex. 49, 53.

patterns the defects of which they now complain. I think not. What is "due diligence" must depend upon the circumstances. Having regard to the order given in the previous year, and the mode in which that order was fulfilled, I think that when the defendants made the contract there was nothing which could reasonably lead them to anticipate that the patterns represented goods possessing the defect which was, in fact, inherent in them. And I am satisfied upon the evidence that the defendants who, undoubtedly, did not discern the defect, did not fail to do so from neglecting to use the means usually adopted by buyers under like circumstances.

I have therefore arrived at the conclusion that the learned judge who tried the case took a correct view of the facts on this part of it, and that his decision was properly affirmed by the Court of Appeal.

As regards the other complaint, viz., that the goods were not woaded according to contract, I have nothing to add to what has been said by the noble Earl on the woolsack. It depended entirely upon disputed questions of fact, and I am not satisfied that they have been erroneously determined.

I therefore concur in the motion that has been made.

LORD MACNAGHTEN:—

My Lords, I venture to think that the case under review may well be decided on the broad principle that a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view.

The real question, as it seems to me, is whether there is anything in the special circumstances of this case to exclude or qualify that implied undertaking.

The goods in question belong to a class of wearing material known in the trade as "corkscrews." They are described in the order as "worsted coatings." Messrs. Van Ingen ordered these coatings for the purpose of sale in the course of their business as woollen merchants. This much at any rate was known to Messrs. Drummond. Knowing this, they accepted the order, and supplied the goods. It turns out that the goods when made up in the

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ordinary way give a result which was not foreseen or suspected by either party. Where the cloth is cut, and stitched in the direction of the warp, the warp readily slips over the weft, and under a moderate strain the clothes part at the seams, and where braiding is used the braid peels off the edges.

It was said that this peculiarity is to be found in all "corkscrews" of a low or medium quality. Defect was not the proper word. It was a "characteristic" of these "corkscrews"—a somewhat bold euphemism when we know that the actual result was as much a surprise to Messrs. Drummond who made the cloth as it was to Messrs. Van Ingen who bought it. It was said that this characteristic would need extra care in making up, but nothing beyond the resources of the tailor's art. The evidence on this point was not altogether satisfactory, and I am not convinced that with a material of this sort even an ingenious tailor could produce a coat that might be safely worn in public, except perhaps by a very careful person. But be that as it may, still the objection remains that no woollen merchant could venture to distribute patterns of such a material, or to recommend it to his customers, without at the same time giving special directions which would amount to a warning against its use. I cannot think that a material which requires such exceptional treatment is reasonably fit for sale by a woollen merchant in the course of his business.

It was argued that, after all, the goods delivered were coatings of a sort and saleable at a price—indeed one of the witnesses for the appellants said that at the date of the order, with the defect known, they would have been readily saleable at the price actually given for them. But the question is not were they saleable, but were they fit for the purpose for which they were known to have been ordered. And I observe that this very witness says that he "would not sell them to a person in the position of Mr. Van Ingen," and that he "should have known that Mr. Van Ingen could not use this class of stuff satisfactorily to himself."

Then it was argued, defect or no defect, the sale was a sale by sample: the goods delivered correspond with the sample, and there is an end to the matter: the seller has fulfilled his bargain. I think the sale was strictly a sale by sample. Certainly the goods corresponded with the sample only too well. But does this

exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligation to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be between merchant and manufacturer. In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill, and he does so all the more readily when, as in this case, he has had the benefit of that skill before.

Now I think it is plain upon the evidence that at the date of the transaction in question merchants possessed of ordinary skill would not have thought of the existence of the particular defect which has given rise to this action, and would not have discovered its existence from the sample. It appears to me, therefore, that the sample must be treated as wholly silent in regard to this defect, and I come to the conclusion that if every scrap of information which the sample can fairly be taken to have disclosed were written out at length, and embodied in writing in the order itself, nothing would be found there which could relieve the manufacturer from the obligation implied by the transaction.

I prefer to rest my view on this broad principle. But it seems to me that the obligation of the manufacturer may be put in another way with the same result. When a manufacturer proposes to carry out the ideas of his customer, and furnishes a sample to shew what he can do, surely in effect he says, "This is the sort of thing you want, the rest is my business, you may depend upon

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it that there is no defect in the manufacture which would prevent goods made according to that sample from answering the purpose for which they are required." As against the manufacturer I think it must be taken that the sample is free from all hidden defects of manufacture which would interfere with the proper use of the manufactured article. If the manufacturer supplies goods corresponding with the sample, but free from all such defects, he fulfils his bargain. If that is beyond his power, he must be responsible for undertaking more than he is able to perform.

There was one argument used on behalf of the appellants which it is difficult to state with perfect gravity. It was contended that somehow the merchants were themselves to blame. They gave their "ideas," as it was called, to the manufacturers, and they put a limit on the price. They wanted something cheap with the look of a high priced article. They ought to be satisfied. Their limit was not exceeded. Their ideas were carried out to the letter. As for the result, however disastrous that may be, it was the natural consequence of aiming too high and paying too low. It was conceded that it would have been the duty of the manufacturers to warn the merchants if they had only known what the result would be. But as they did not know it they claim to shelter themselves under their ignorance—ignorance, be it observed, of their own business—and to throw the blame on the merchants who relied on their skill. It would be just as reasonable for an architect who is employed to build a house, and who builds one unsafe for habitation, to turn round on his employer and say, "You must remember you pressed your ideas upon me; you wanted this and you wanted that; you were all for show, and you objected to expense; you have got exactly what you told me you wanted; and if you had been a little more liberal I should have made provision for a more solid foundation; of course I should have told you if I had known the house would be likely to tumble down. But really I did not think about it, and so I am not answerable for the instability of the structure."

Your Lordships were told that if you uphold the decision of the Courts below, you will be going further than any decided case has gone. I am not so sure of that. True, no case was cited in which the facts are precisely similar. There is no fraud

here, as there was in *Heilbutt* v. *Hickson* (1). If adulteration be something different from fraud, there is no case of adulteration, as there was in *Mody* v. *Gregson* (2). But the governing principle in all the cases is the same. And, indeed, so far as I can see, there is no substantial distinction between the facts in the present case and the facts in *Jones* v. *Bright* (3). There the defendants were manufacturers of copper. The plaintiff wanted copper to sheath a vessel. The defendants knew for what purpose he wanted it. The plaintiff's shipwright went to the defendants' warehouse and selected what he thought would suit, and he sheathed the vessel with the copper he selected himself. The sheathing was found to be decayed at the end of four or five months while it ought to have lasted four or five years. The plaintiff sued for damages. The jury found that the decay of the sheathing was occasioned by some intrinsic defect in the copper, but they could not tell what the cause of that defect was. There was no trace of fraud there. The defect was unknown and unsuspected. The Chief Justice stated that the conduct of the defendants was "most upright." But still he held them liable, and though some members of the Court took a narrower ground, he based his judgment on the broad principle that manufacturers were bound to supply an article fit for the purpose for which they knew it was required. I can see no distinction between a sale by sample where the sample gives incomplete and consequently misleading information, and a case where the purchaser selects the goods in bulk, and those goods have an intrinsic defect not discoverable on inspection.

Your Lordships were warned that if the appeal should be dismissed the effect would be to hamper trade, and to cast on manufacturers a burden which has not been cast on them hitherto. That is the stock argument in all these cases. It was urged and rejected in *Mody* v. *Gregson* (2). It met the same fate in *Jones* v. *Bright* (3). It has never yet availed to relieve manufacturers from the liability which they assume, by inviting customers to rely on their skill, or to excuse persons from fulfilling their contracts according to the real intention and true meaning of the bargain.

(1) Law Rep. 7 C. P. 438. (2) Law Rep. 4 Ex. 49. (3) 5 Bing. 533.

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For these reasons I concur in the motion which has been proposed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 1st April 1887.

Solicitors for appellants: *Jaques, Layton, & Jaques, for Watson & Dickons, Bradford.*

Solicitors for respondents: *S. Learoyd & James, for Learoyd & Piercy, Huddersfield.*

[HOUSE OF LORDS.]

H. L. (E.) 1887, *May* 20.

IND, COOPE & CO. AND OTHERS . . . . APPELLANTS;

AND

MARY ANN GRACE EMMERSON . . . RESPONDENT.

Action for Recovery of Land—Discovery—Title Deeds—Purchaser for Value without Notice—Privilege—Practice—Judicature Act 1873 (36 *&* 37 *Vict. c.* 66) *s.* 24 *sub-s* 2.

An action having been brought in the Chancery Division to recover possession of land and claiming production and delivery of documents alleged to be material to the plaintiff's title, the defendants pleaded that they were purchasers for valuable consideration without notice, and on this ground objected to the discovery and production of certain documents of title:—

Held, affirming the decision of the Court of Appeal (33 Ch. D. 323), that the objection was invalid for the following reason:—

Before the Judicature Act 1873 a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles. Sect. 24 sub-sect. 2 of the Act of 1873, therefore, gives no protection to the defendants, the Court having now complete jurisdiction over the whole action.

THE respondent having brought an action to recover possession of certain lands and having also claimed by her statement of claim production and delivery of certain papers, deeds and documents, which she alleged to be material to her title, the appellants by their defence alleged that they were in possession, and further that they were purchasers for valuable consideration without

notice. The usual order for an affidavit of documents having been made against the defendants, they made an affidavit that with regard to the whole of certain documents of title admitted to be in their possession they were purchasers for valuable consideration without notice, and that some of such documents did not prove or tend to prove the plaintiff's case. The plaintiff having taken out a summons for production of these documents, Chitty J. dismissed the summons. On appeal the Court of Appeal (Cotton, Lindley and Lopes L.JJ.) discharged the order of Chitty J. except as to documents which the defendants swore did not prove or tend to prove the plaintiff's title (1).

From this order the present appeal was brought.

Mar. 31, April 1. Sir *H. Davey* Q.C. and *Haldane*, for the appellants:—

The plea that the defendant is a purchaser for valuable consideration without notice can be set up as an equitable defence to the claim and proceedings for discovery in this action by virtue of sect. 24 sub-sect. 2 of the Judicature Act 1873. Before that Act such a plea would have been a good equitable defence to a bill for discovery only, and under the present rules the right of discovery is not in principle more extensive than it formerly was in the Court of Chancery; the right to discovery is regulated by the rules previously existing in the Court of Chancery: *Anderson* v. *Bank of British Columbia* (2); *Kearsley* v. *Phillips* (3). As against such a purchaser there is no power to order discovery in aid of proceedings to establish a legal title in cases where the jurisdiction of the Court of Chancery as regards the legal relief claimed would have been before the Judicature Act auxiliary only, as distinguished from concurrent. The principle on which the Court of Chancery treated such a plea appears from many cases: *e.g.*, *Wallwyn* v. *Lee* (4); *Colyer* v. *Finch* (5); *Heath* v. *Crealock* (6); *Jerrard* v. *Saunders* (7); *Pennington* v. *Beechey* (8); see

(1) 33 Ch. D. 323; where the pleadings are more fully set out than is necessary for the present report.
(2) 2 Ch. D. 644.
(3) 10 Q. B. D. 465.
(4) 9 Ves. 24, 32.
(5) 5 H. L. C. 905, 921.
(6) Law Rep. 15 Eq. 257; 18 Eq. 218.
(7) 2 Ves. jun. 454.
(8) 2 S. & S. 282.

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also *Harrison* v. *Southcote* (1). In *Phillips* v. *Philips* (2) Lord Westbury no doubt cited two cases relied on by the present respondent, *Williams* v. *Lambe* (3), and *Collins* v. *Archer* (4), but those cases were doubted by Lord St. Leonards, Vendors and Purchasers, 14th ed. 1862, pp. 792, 3.

[LORD HERSCHELL referred to the discussion of those cases in 1 Story Eq. Jur., 12th ed. 410, n. 3.]

The distinction relied on by the respondent in cases where the Court of Equity had concurrent jurisdiction must be considered as at the least very doubtful. In Wigram on Discovery, 2nd ed. pp. 81, 82, there is an expression of opinion adverse to the appellants, but the cases cited in support of the opinion, *Ovey* v. *Leighton* (5), and *Earl of Portarlington* v. *Soulby* (6), do not support it. They admit the general doctrine that such a plea is good, and only affect the question of the mode of raising the defence. The general doctrine was also admitted by a Common Law Court in *Gomm* v. *Parrott* (7). A plaintiff in ejectment at common law had no right to discovery under the Common Law Procedure Act 1854: *Horton* v. *Bott* (8). The result of the authorities is, that before the Judicature Act 1873 there was no power at law to give a plaintiff in ejectment discovery of documents; nor in equity if this plea was pleaded. A plaintiff in ejectment had two rights; one a legal right in an action at law: the other an equitable right to discovery to be pursued in the Court of Chancery, and against this right all equitable defences were available. The Judicature Act 1873 made no change in this latter respect. Sect. 24 sub-sect. 2 expressly preserves the right of equitable defence in cases like the present. The present is not to be regarded as a suit in equity. It is really an action at law and a bill for discovery rolled into one.

April 21. *Whitehorne* Q.C. and *Rigby* Q.C. (*E. Ford*, with them), for the respondent:—

There is no recorded case where the Court of Chancery refused

(1) 1 Atk. 534.
(2) 4 D. F. & J. 208, 217.
(3) 3 Bro. C. C. 264.
(4) 1 Russ. & My. 284.
(5) 2 S. & S. 234.
(6) 7 Sim. 28.
(7) 3 C. B. (N.S.) 47.
(8) 2 H. & N. 249.

relief against a purchaser for value without notice when complete relief was asked, as distinguished from auxiliary. Where the Court had to declare the right the defence of purchase for value without notice was of no avail: *Newton* v. *Newton* (1) distinguishing *Wallwyn* v. *Lee* (2); and see *Greenslade* v. *Dare* (3); *Stackhouse* v. *Countess of Jersey* (4); and Wigram on Discovery, 2nd ed. pp. 67, 81.

In *Williams* v. *Lambe* (5) the plea was held not good against a bill for dower; and in *Collins* v. *Archer* (6) it was held of no avail against a plaintiff who relies upon a legal title. These two cases conclusively establish the proposition that the defence was no defence, either against discovery or relief where the Court of Equity had concurrent jurisdiction with the Common Law Courts; and see *Phillips* v. *Phillips*, per Lord Westbury (7); and *Lyell* v. *Kennedy*, per Lord Selborne (8). The defendants do not therefore bring themselves within sect. 24 sub-sect. 2 of the Judicature Act 1873. The present is not a proceeding for auxiliary relief. But even if it were relief may be granted against a purchaser for value without notice: *Manners* v. *Mew* (9).

The defence as pleaded does not amount to such a plea as would have been allowed under the old practice. The true form of plea must be carefully observed: See Beames on Pleas, Appendix p. 341 setting out the plea in *Wallwyn* v. *Lee* (2).

Sir *H. Davey* Q.C. replied.

The House took time for consideration.

May 20. EARL OF SELBORNE:—

My Lords, by Order XXXI. of the Supreme Court, the rules laid down as to discovery are, that interrogatories may be delivered for the examination of defendant by plaintiff, or plaintiff by defendant, "in every cause or matter" (except cases of alleged fraud or breach of trust, in which they are to be of right) by leave

(1) Law Rep. 4 Ch. 143.
(2) 9 Ves. 24.
(3) 17 Beav. 502.
(4) 1 J. & H. 721.
(5) 3 Bro. C. C. 264.
(6) 1 Russ. & My. 284.
(7) 4 D. F. & J. 208, 217.
(8) 8 App. Cas. 217, 226.
(9) 29 Ch. D. 725, 732.

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of the Court or judge; and that if interrogatories are delivered, any objection to answering any one or more of them, on any ground (i.e., some ground legally admissible), may be taken by the affidavit in answer: and that any party may apply to the Court or a judge for an order directing any other party "to any cause or matter," to make discovery on oath of documents; the party against whom any such order is made being at liberty to object (specifying the grounds of his objection) to the production of any particular documents; and it being for the Court or a judge to decide on the validity of any such objection, if taken.

So far as this order goes, the rules as to discovery are general, and apply equally (with the exception mentioned) to *all* causes and matters. But it is left open to the party required to make discovery, in every cause or matter, to object to any particular discovery on any ground which he may think tenable; and it is for the Court or a judge to decide whether such ground is tenable or not.

I assume, for the purpose of the present question, that a party to whom interrogatories have been delivered by leave of the Court or a judge, may by affidavit in answer object to answer all or any part of them, not only on any special ground of objection to particular discovery, but also on the general ground, that he is privileged, by the position in which he stands, against giving any discovery at all in a suit such as that brought against him. It may be, that if such a privilege could be shewn to be well founded in law, he would have that right; though I do not think it necessary now to decide that question. The question to be now decided is whether every defendant, who under the old practice in Chancery might have successfully pleaded, to a bill for discovery in aid of an action at law, that he was a purchaser for valuable consideration without notice, has, under the present law of the High Court of Justice, a privilege of absolute exemption from the obligation to make discovery? The Court of Appeal has held the contrary; and with that opinion I agree.

The argument for the appellants has been, that under sect. 24 (sub-sect. 2) of the Judicature Act of 1873, the Court, and every judge is bound to give to "every *equitable defence*" properly alleged, "such and the same effect by way of defence *against*

the claim of the plaintiff or petitioner as the Court of Chancery ought to have given, if the same or the like matter had been relied on by way of defence *in any suit or proceeding instituted in that Court for the same or the like purpose*, before the passing of the Act." It was contended, that in the Court of Chancery, before the passing of the Act of 1873, a plea of purchase for valuable consideration without notice would have been a good equitable defence to a bill for discovery only; and, therefore, that it is now a good equitable defence against discovery in the present action, which is (in effect)an action of ejectment brought by the plaintiff upon an (alleged) legal title: or, at all events against the production of those deeds and documents, of which production and delivery are expressly asked by the plaintiff's amended statement of claim, and which she therein alleges to be necessary to establish her title.

I will consider, first, the question as to the right to discovery generally; and afterwards, that as to the discovery of the deeds and documents of title.

The first observation to be made is, that the Court of Chancery, when it allowed a plea of purchase for valuable consideration without notice to a bill for discovery only, allowed it, not to particular discovery (as, e.g., of certain deeds and documents), but to the whole; not on the ground that certain things ought not to be inquired into, but because the Court ought not as against such a purchaser, to give any assistance whatever to a plaintiff suing upon a legal title in another jurisdiction. And, upon the same ground, a like plea would have been allowed to a suit asking for more than discovery (e.g., for an injunction to restrain the defendant at law from setting up outstanding terms), when the object of the suit was still to obtain from the Court of Chancery assistance to the suit of the plaintiff, suing upon a legal title in another jurisdiction. The defence was, in effect, "*no equity*," which is a different thing from an "equitable defence." It was thought inequitable, generally, that a man should defeat a legal title by keeping back facts in his own knowledge, or by setting up outstanding terms; it was thought *not* inequitable that a purchaser for value without notice should use any such *tabula in naufragio*, as best he could. But in the present case there is no

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suit in any other jurisdiction; the High Court of Justice is asked, and is competently asked, to exercise a principal, and not an auxiliary jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the Court of Chancery it would have been demurrable; not because there was an equitable defence, but because the title was legal, and the plaintiff stated no equity. To abolish that division of jurisdictions was the very object of the Judicature Act. As against "*the claim*" of the plaintiff, in this suit, it is not, and it cannot be, pretended, that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the Courts of Equity and the Courts of Common Law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defence available against discovery (otherwise proper) in a suit in which it is not available against the relief, and in which the High Court has proper jurisdiction to try, and must try and determine, the question of title. And, accordingly, we find that there is no instance of any suit competently brought in the Court of Chancery, for relief as well as discovery, in which the defence of purchaser for value without notice has been held available against discovery incident to the relief, and not against the relief itself also. That defence was never admitted as an objection to particular discovery; it went to all or none. And in those cases, in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles, it was not available against either discovery or relief: *Williams* v. *Lambe* (1); *Collins* v. *Archer* (2); *Phillips* v. *Phillips* (3).

In the words therefore of that section of the Judicature Act on

(1) 3 Bro. C. C. 264. (2) 1 Russ. & My. 292.
(3) 4 D. F. & J. 217.

which the appellants' reliance was placed, this would not, before 1873, have been a good equitable defence to discovery in the Court of Chancery "in any suit or proceeding instituted in that Court *for the like purpose*."

With respect to the deeds and documents of title, the appellants would be privileged against their production, if they could say on oath that they related solely to their own title, and did not in any way tend to prove or to support the title of the plaintiff. But the present question relates to deeds and documents, as to which they have not made (and I presume cannot make) any such averment. To the discovery of such deeds and documents, as evidence to be used at the trial in support of the plaintiff's case, no principle or authority is, in my judgment, opposed. The case of *Wallwyn* v. *Lee* (1), before Lord Eldon, was that of a plea (which was allowed) to relief as well as discovery; and that of *Joyce* v. *de Moleyns* (2), before Lord St. Leonards, was also one in which the defence (which prevailed) was to the whole suit.

I am, therefore, of opinion that the order appealed from is right, and that this appeal ought to be dismissed with costs.

LORD WATSON:—

My Lords, until the Judicature Act of 1873 came into operation, the plaintiff in an ordinary action of ejectment could not obtain discovery from his opponent, except by an application to the Court of Chancery, which had no jurisdiction in regard to the subject-matter of the suit. It was the general practice of the Court to aid the litigant, who thus applied to it, by giving discovery; but an exception was made when the defendant in ejectment had in bonâ fide purchased and paid for the property forming the subject of the litigation without notice of the plaintiff's right. In that case the Court declined to exercise its auxiliary jurisdiction, upon the ground that there was no equity requiring it to interfere and deprive the purchaser of what was termed his tabula in naufragio. On the other hand the authorities which were referred to in the course of the argument appear to me

(1) 9 Ves. 24. (2) 2 Jon. & Lat. 374.

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to establish that in cases where the plaintiff applied to the Court of Chancery for complete relief, which its jurisdiction enabled the Court to give, the Court did not hesitate to deprive the defendant, although a purchaser for value and without notice, of the advantage which, in the exercise of its auxiliary jurisdiction, it permitted him to retain.

I think it is impossible to affirm that a Court of Equity ought always to give to a litigant who is suing before another tribunal the same assistance to which he would have been justly entitled if the principal action had depended before itself. However that may be, the decision of this appeal appears to me to depend upon the practice as settled, and not upon the sufficiency or insufficiency of the considerations which led to its adoption.

The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit and without the necessity of resorting to another Court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings. In pursuance of that object, the Act has given to both sides of the High Court the same jurisdiction in suits for the recovery of land which previously belonged to the Courts of Law; and also (subject of course to its provisions) the same jurisdiction to grant discovery, for the purposes of these suits, which had belonged exclusively to the Court of Chancery. Auxiliary proceedings, with a view to discovery, in a Court other than that before which the principal suit depends, are inconsistent with its provisions, and are no longer competent.

The present suit, which is for possession of land, and is in substance an action of ejectment, was instituted in the Chancery Division, and it might, with equal competency, have been brought before the other side of the High Court. The plaintiff has applied for discovery, against which the defendants have stated the plea that they are purchasers for value, without notice of her title. I am not satisfied that, if otherwise available, the plea would have been prejudiced by the alteration in the form of pleadings which the Judicature Act has introduced. Whether it is still available to the defendants, depends upon the construction of sect. 24 sub-sect. 2, which deals expressly with the effect

to be given to equitable defences by the new Courts constituted under the provisions of the Act.

The Act of 1873 deals with the remedies and not with the rights of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into Court, and submit to the judgment of the Court, whether as plaintiffs or as defendants. But it does not follow that its provisions cannot affect the substance as well as the form of the procedure by means of which these rights are to be ascertained and enforced. Discovery is matter of remedy, and not matter of right. If an Act had been passed by the legislature which simply transferred jurisdiction in ejectment suits to the Court of Chancery that would have been a statute altering, not the rights of parties, but the tribunal before which their remedy was to be sought; yet it does not seem to me to be doubtful that its effect would have been to deprive the defendant, who was a purchaser for value and without notice, of the benefit of the plea, founded on these circumstances, which he could have urged successfully in a mere auxiliary proceeding.

Sect. 24 sub-sect. 2 enacts that the new Courts shall give to every "equitable defence" the same effect which the old Court of Chancery ought to have given "if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act." Assuming the plea in question to be an "equitable defence," within the meaning of the sub-section, is an application for discovery, made in the principal cause to the judge before whom it depends, to be regarded as a suit or proceeding instituted for the same or the like purpose, with an application made to the old Court of Chancery in aid of an action of ejectment depending before a Court of Common Law? In my opinion, that question must be answered in the negative. Before the Act of 1873 the Court of Chancery observed a distinction between an incidental application, in causâ, to a Court competent to give full equitable relief, and an application for discovery to another Court. Although in an auxiliary application the Court of Chancery declined to interfere with a bonâ fide purchaser for value, yet it appears to me to have invariably acted

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upon the principle that a Court which had jurisdiction, not only to give relief to the plaintiff but to enforce the equitable claim of the defendant, was bound by equitable considerations to grant discovery. That is, in my opinion, the rule which ought to be followed in considering whether the plea advanced by the appellants in this case should be sustained; and I have accordingly come to the conclusion that the order of the Court of Appeal must be affirmed.

LORD FITZGERALD :—

My Lords, I entirely concur. I adopt the judgment of the noble Earl and the conclusion at which he has arrived, and also the judgment of my noble and learned friend opposite (Lord Watson).

LORD HERSCHELL :—

My Lords, I have arrived at the same conclusion. I think the appellants have established that prior to the Judicature Act the plaintiff in this action could not have compelled the defendants to make the discovery which she seeks either in a Court of Law or Equity. And it seems at first sight strange that by reason of a change of procedure the object of which was not, except in certain specified cases, to alter rights but only to enable every Division of the High Court to administer both law and equity and to afford all the relief to which the parties were entitled, it should be possible to obtain discovery when it could not previously have been had either at law or in equity. But I think the explanation is to be found in the fact that the right of a purchaser for value to exemption in equity from the obligation to make discovery had its origin in and was founded upon that separation of jurisdiction which it was the object of the Judicature Act to abolish. Where a plaintiff suing at law on his legal title sought the assistance of a Court of Equity to procure discovery, that aid was denied when the defendant was a purchaser for value. To a bill filed praying discovery the plea that the defendant was a purchaser for value without notice was a complete answer. And it was an answer, too, in all cases in

which the auxiliary jurisdiction of the Court of Equity was appealed to in furtherance of an action. But I think it was well settled, at the time the Judicature Act was passed, that it was only where discovery was thus sought as auxiliary to an action that it could be successfully resisted by a purchaser for value. If the Court of Equity had concurrent jurisdiction and a plaintiff sought to enforce his legal title there, as for example in a case of dower, the Court compelled discovery even by a purchaser for value as ancillary to the principal relief sought by the suit. No case was cited at the bar in which discovery ancillary to other relief had been refused by the Court.

Under the existing system it is not necessary to apply to one branch of the Court as auxiliary to another. And there is no longer any need of praying for discovery in the statement of claim which is substituted for a bill. The plaintiff in every action is entitled to discovery as ancillary to the relief which he claims in the action.

It is contended that the right to resist discovery is preserved to a purchaser for value, because by sect. 24 sub-sect. 2 of the Judicature Act the Court is bound to give to every equitable defence such and the same effect by way of defence against the plaintiff as the Court of Chancery ought to have given if the same or the like matter had been relied on by way of defence in any suit instituted in that Court for the same or the like purpose before the passing of the Act.

I think it may fairly be said that the allegation that the defendant was a purchaser for value was an equitable defence. For the matter which was a bar to the suit did not appear on the face of the bill and needed to be set up by plea. But it was not an equitable defence unless the bill sought discovery only to assist a plaintiff who was pursuing his remedy elsewhere. I therefore am of opinion that the present action in which the plaintiff seeks to recover possession of land to which she alleges a legal title and applies for discovery as ancillary thereto is not an action instituted for the same or a like purpose as that in which a plea of purchase for valuable consideration could have been relied on as an equitable defence.

I cannot profess to be satisfied with the reasoning which led

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the Court of Chancery to deny its ordinary assistance to a plaintiff who was suing a purchaser for value at law and to afford the very same kind of assistance to a plaintiff who having a choice of either jurisdiction selected the Court of Chancery as the tribunal to enforce a legal right. But I am satisfied that the distinction existed and that it was only in the former case that discovery could be resisted.

Every plaintiff is now primâ facie entitled to discovery in any action, and I can find nothing either in the Act or in the rules to warrant us in depriving the present plaintiff of the right thus conferred.

I accordingly concur in thinking that this appeal must be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 20th May 1887.

Solicitors for appellants: *Haynes & Clifton.*
Solicitor for respondent: *John W. Sykes.*

[HOUSE OF LORDS.]

H. L. (D.) 1887 *March* 21.

HEWAT'S DIVORCE BILL.

SECOND READING.

Divorce Bill—Bastardising Clause.

A paragraph in a divorce bill contained allegations tending to bastardise a child to which the wife had given birth during the marriage. There was access at the natural period of the conception of the child:—

Held, that such paragraph was inadmissible, and must be struck out of the bill.

THIS was a bill promoted by the husband William Hewat, for the dissolution of his marriage with Agnes Anna Hewat on the ground of adultery. The parties were married on the 6th of October, 1875, and the respondent continued to occupy the petitioner's house until the 22nd of September, 1885. On the

20th of July, 1886, the Probate and Matrimonial Division of the High Court of Judicature for Ireland found that the respondent had committed adultery with George Henry Johnston Lyttle, and pronounced a final decree of divorce from bed and board and mutual cohabitation against the respondent. In another action, damages for criminal conversation had been awarded against Mr. Lyttle.

James Roberts, for the petitioner, stated that the respondent was in a very excitable state in the summer of 1885, and ceased to occupy the same bed with the petitioner. On the 22nd of September, 1885, she left the petitioner's house and went to reside with her sister, Mrs. Lloyd, in Manchester. The petitioner had not seen her since. Subsequently he received from Mrs. Lloyd a letter containing an inclosure from the respondent, to Mrs. Lloyd. This inclosure was a letter from Dartmouth, October, 1885, and was to the effect that she and Mr. Lyttle were on their way to South Africa. Later Mrs. Hewat wrote from South Africa to the petitioner stating she had been very ill, and that she was coming back to England, and would he send some one to meet her. On the 25th of November, 1885, she wrote: "I know I have forfeited all right to be taken back." She returned to England, and again went to reside with her sister in Manchester. On the 2nd of May, 1886, she was delivered of a male child, which Mr. Lyttle registered in his own name.

Mr. Hewat was examined, and bore out the above statement.

A witness deposed to Mrs. Hewat and Mr. Lyttle occupying the same cabin on board the *Norham Castle* bound for Algoa Bay, South Africa.

The bill contained this paragraph, "That up to the 22nd day of September, 1885, there was no issue born of the marriage, but on the 2nd day of May, 1886, the said Agnes Anna Hewat gave birth in the city of Manchester to a male child (which your said subject does not acknowledge to be his offspring), to wit—Percy Edwards Burrowes, surnamed Lyttle, reputed to be the son of George Henry Johnston Lyttle. [LORD HALSBURY:—Their Lordships cannot allow that paragraph to be in the bill.] There are two or three precedents. [LORD HALSBURY:—This birth was

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within the period of capable access. You are asking the House to decide the question raised by this paragraph in the absence of the person most interested, namely, in the absence of the child.] The allegation on the face of it is that the petitioner does not acknowledge the child to be his. It is submitted that the evidence of the petitioner and the confession of the wife are admissible to prove the fact that at this particular date they did not recognise the child as the child of the petitioner. But the petitioner does not wish to do anything which would prejudice the child. He is not seeking to set aside the marriage settlement under which the child would be entitled to an interest in a certain fund, and if the paragraph is objected to the petitioner will have the bill amended.

THE HOUSE held the adultery proved, but added that it must be distinctly understood that the paragraph to which attention had been called should be struck out in committee.

The bill was ultimately amended in committee, and became law on the 23rd of May, 1887.

In this case the House allowed on the 11th of February, 1887, substituted service of a copy of the bill and notice of the second reading to be made on the wife's solicitor, Mr. J. G. Wheatley, it having been proved that she had authorized him to accept service of any such proceedings.

Lords' Journals, February 11, March 21, May 23, 1887.

Agents: *Mills, Lockyer, & Mills*, for *W. W. Carruthers*, solicitors, *Dublin*.

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE APPELLANTS;

AND

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY . . . . . RESPONDENTS.

H. L. (Sc.)
1887
May 20.

Stamp—Ad valorem duty—Stamp Act, 1870, *Schedule and s.* 70—*Conveyance on Sale—Compulsory Sale under Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19)—*Compensation for Loss of Trade.*

The schedule of the Stamp Act of 1870 (33 & 34 Vict. c. 97) prescribes an ad valorem duty on every "conveyance or transfer on sale of any property." By sect. 70 the term "conveyance on sale" includes every instrument whereby any property upon the sale thereof is transferred to or vested in the purchaser.

By deed of conveyance S. & Co. conveyed business premises to a railway company. The deed stated that the jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, had found that S. & Co. were entitled to £28,586 2*s.* 1*d.* as the value of the premises which had been taken by the company under the powers of their special Act; £14,572 16*s.* 3*d.* for the value of the buildings, &c., upon the premises, and £9499 8*s.* 3*d.* as compensation for loss of business, and that the company had paid the three sums so assessed to S. & Co.:—

Held, reversing the decision of the Court of Session, that the £9499 8*s.* 3*d.* allowed by the jury as compensation for loss of business was part of the "consideration for the sale" of the premises, and liable to ad valorem duty accordingly.

APPEAL from a judgment of the First Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated under the Stamp Act, 1870 (33 & 34 Vict. c. 97, s. 19), by the appellants, the Commissioners of Inland Revenue, at the request of the respondents, the Glasgow and South-Western Railway Company.

It appeared that in 1885 the respondent company took steps to acquire certain property under the powers of their special Act. This property consisted of lands and buildings occupied by Sommerville & Co., timber merchants, &c., Greenock, who carried on business on the premises at the time they were required to sell them to the respondents. A special jury having been summoned under the Lands Clauses Consolidation (Scotland) Act,

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1845, to assess the compensation payable by the respondents to Sommerville & Co. for the premises in question, they awarded compensation under three heads. First, the sum of £28,586 2*s.* 1*d.* as the value of the land; second, £14,572 16*s.* 3*d.* as the value of the buildings, machinery, plant, and others; and, third, £9499 8*s.* 3*d.* as compensation for loss of business. The premises were conveyed to the respondents by Sommerville & Co. by deed, stating the amount assessed by the jury.

The material part of the conveyance to the respondents was as follows:—

"We, Sommerville & Co., timber merchants and saw millers, Caledonian Saw Mills, Greenock, as a company, and we, Henry Birkmyre, merchant, Port-Glasgow, and we, Robert Galbraith Sommerville, sometime merchant in Glasgow, now saw miller and timber merchant, Greenock, co-partners, carrying on business in Greenock as saw millers and timber merchants, formerly under the company name or firm of John Robb & Co., now under the said company name or firm of Sommerville & Co., as such co-partners, and also as individuals, and also as trustees standing heritably vest in the pieces of ground and shore ground, machinery, and others hereinafter disponed in trust for behoof of the said firm of John Robb & Co., and partners thereof, and now for behoof of the said company of Sommerville & Co., and whole partners thereof, considering that by verdict of the special jury in the action or trial under the Lands Clauses Consolidation (Scotland) Act, 1845, brought before the sheriff of Renfrew and Bute, at Greenock, on the petition of the Glasgow and South-Western Railway Company, for the purpose of assessing the compensation payable by them to the said Sommerville & Co. for the land or property and others particularly specified in the said petition, the jury, on the 11th of April, 1885, found the said Sommerville & Co. entitled to the sum of £28,586 2*s.* 1*d.* as the value of the said land or property taken, or about to be taken, by the said railway company, under the powers contained in and for the purposes of their Act, second thereinafter mentioned, and extending in all to 38,753 square yards and three-fourth parts of a square yard or thereby, imperial standard measure, the sum of £14,572 16*s.* 3*d.* for the value of the buildings, machinery, plant,

and others upon the said land or property, and the sum of £9499 8*s.* 3*d.* as compensation for loss of business, said three sums amounting in all to the sum of £52,658 6*s.* 7*d.* And seeing that the said Glasgow and South-Western Railway Company, incorporated by the Glasgow and South-Western Railway Consolidation Act, 1855, have, pursuant to the Glasgow and South-Western Railway Act, 1881, paid to the said Sommerville & Co. the said sums of £28,586 2*s.* 1*d.* and £14,572 16*s.* 3*d.* as the value of the foresaid land or property, and of the foresaid buildings, machinery, plant, and others, of which two sums they, the said Sommerville & Co., thereby acknowledged the receipt, and that the said railway company has also paid to them, the said Sommerville & Co., the said sum of £9499 8*s.* 3*d.*, conform to separate receipt and discharge granted by them therefor.

"*Dispositive Clause.*—Therefore the said Sommerville & Co., &c., do hereby sell, &c., from them, their heirs, &c., to the said railway company, &c., for ever, according to the true intent and meaning of the said Acts, all and whole those pieces of ground and shore ground, extending to . . . and lying within the parish of Greenock, &c., being the whole of our property, known as the Caledonian Saw Mills, with the rights of ish and entry pertaining thereto." [Then followed a description of the lands and the whole buildings and heritable and moveable machinery thereon which were conveyed.]

There was also a receipt and discharge granted by Sommerville & Co. to the railway company for payment of the sum of £9499 8*s.* 3*d.*

The respondents presented the above conveyance to the Commissioners to have their opinion as to the stamp duty with which it was chargeable. The Commissioners were of opinion that, under sect. 70 of the Stamp Act, 1870 (1), the amount of the consideration for the sale consisted of the total sum of £52,658 6*s.* 7*d.* paid, which included the sum of £9499 8*s.* 3*d.* The respondents contended that the sum of £9499 8*s.* 3*d.* ought not to be reckoned as part of such consideration.

On the 22nd of January, 1886, the First Division of the Court

(1) 33 & 34 Vict. c. 97.

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of Session held (1) that by the terms of the 70th section of the Stamp Act of 1870, and the schedule thereto (2), this £9499 8*s.* 3*d.* was not part of the consideration for which the subjects were conveyed. Lord Shand dissented.

On appeal,

May 20. *The Lord Advocate* (*MacDonald*, Q.C.); Sir *R. Webster*, A.G.; *The Solicitor-General for Scotland* (*Robertson*, Q.C.); and *A. J. Young* (of the Scotch bar), for the appellants:—

The decision of the Court of Session is erroneous, and ought to be reversed. The consideration for sale is the whole amount paid by the company. The last item represents the special value attaching to the ground and buildings as a place of business. The railway company would not have obtained the land unless they had agreed to pay the consideration given for loss of business. The railway company had no right to divide up these sums, nor was there any special direction to the jury to separate them. The question for the jury was the value of the vendors' interest in the land. In *Potter* v. *Commissioners of Inland Revenue* (3), it was held that the assignment by deed by one partner to another of a share of the goodwill of the business was clearly liable to an ad valorem duty, because goodwill was property within the meaning of the Stamp Act. In *Pile* v. *Pile, Ex parte Lambton* (4), an arbitrator awarded a sum of £11,950, of which he certified that he had awarded £2800 in respect of the loss of profit in carrying on the business. In a question between a mortgagor's executor and the mortgagees, who had entered and carried on the business, the Court of Appeal held that the £2800 was in the nature of

(1) 13 Court Sess. Cas. 4th Series, 480; 23 Sco. Law Rep. 312.

(2) By the schedule of the Stamp Act of 1870 (33 & 34 Vict. c. 97), there are charged the following stamp duties:—

"Conveyance or transfer on sale of any property (except such stock, or debenture stock, or funded debt as aforesaid), where the amount or value of the consideration for the sale does not exceed £5 0*s.* 6*d.*," and so on.

Sect. 70 enacts: "(1) The term 'conveyance on sale' includes every instrument and every decree or order of any Court, or of any Commissioners, whereby any property, upon the sale thereof, is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction."

(3) 18 Jur. 778; 10 Ex. 147; 23 L. J. (Ex.) 345. See also *Caldwell* v. *Dawson*, 5 Ex. 1; Tilsley on Stamps, 3rd ed. p. 198; *Horsfall* v. *Key*, 17 L. J. (Ex.) 266.

(4) 3 Ch. D. 36.

compensation for the value of the goodwill of the business which passed with the premises, and that the whole sum of £11,950 belonged to the mortgagees. If the whole amount here was paid to get possession of the land, this fact cannot be altered by its being subdivided.

[They referred to the Lands Clauses (Scotland) Act, 8 & 9 Vict. c. 19, ss. 3, 48, 74.]

Balfour, Q.C., and *R. S. Wright*, for the respondents :—

The compensation awarded by the jury was for the destruction of the business, and not for anything which passed to the company. There was no conveyance of the goodwill; had there been, the sum awarded would have been much higher, and Sommerville & Co. would have been prohibited from starting a rival business. "Goodwill" is not a right which is either part of the land or the interest conveyed; it may be personal or local. Personal, where a successful trader sells all his trade debts, books and shop, and also undertakes not to set up in the neighbourhood. Local, as attached to a public house, or other house favourably situated for trade. The Lands Clauses Consolidation (Scotland) Act contemplated two heads of claim—the price and compensation. Price is what is paid simply for the hereditament with all its advantages and disadvantages; but there can be another element of loss, such as breaking up a business. The compulsory buyer in the exercise of his statutory powers stops the occupier from prosecuting his business, hence compensation. It was a mere accident that Sommerville & Co. occupied the two positions of proprietors of the ground and occupiers. If they had been only occupiers, no conveyance would have been necessary, and the sum of £9499 8*s.* 3*d.* would have been paid simply on their receipt. The form of notice was in the terms of sect. 17 of the Act 8 & 9 Vict. c. 19. Every notice must state that the promoters are ready to treat for the purchase of the interest in the lands, and also as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works. Plainly, therefore, the frame of the notice does contemplate that there shall be compensation for disturbance as distinct from the right to the soil.

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[They also referred to *Hammersmith Railway Company* v. *Brand* (1), per Lord Cairns.]

No reply was called for.

Judgment was delivered as follows:—

LORD HALSBURY, L.C.:—

My Lords, I cannot say that any doubt has been infused into my mind by the arguments which have been addressed to us by Mr. Balfour and Mr. Wright. The matter seems to me to be an exceedingly plain one. That which the railway company had, under the powers of the Act, power to do was to take land compulsorily from the owners, and the statute has provided the machinery by which the price at which it is to be taken should be ascertained. The parties may if they please agree, but if they do not agree the price is to be ascertained as between them, and two subjects-matter are dealt with by the statute—one the value of the property so taken, and the other the question of severing the property so taken from the lands held therewith.

The 48th section of the statute is that which in truth we are at present construing; because this is a proceeding under the 48th section, and although the other sections of the statute may be quoted to throw light upon and to interpret the language of that section, that which your Lordships are considering at present is proceedings under the 48th section. That section expressly provides—"Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict," and so on; and the latter part of the section refers to severance. The two things, and the only two things, which are within the ambit and contemplation of the statute, are the value of the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them.

Now, my Lords, that seems to me to be at the foundation of the whole argument. That was alone what the jury in this case had power to assess, because it is admitted that no question arises here upon the other part of the section—no question arises

(1) Law Rep. 4 E. & I. at pp. 218, 219.

here about any damage from severance. It is admitted, therefore, impliedly, that the only thing which the jury had here to assess was the value of the land. My Lords, of course the word "value" is itself a relative term, and in ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the legislature itself. We, however, must be guided by what the language of the legislature is. Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the goodwill" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation. As Mr. Balfour has pointed out, the language used in this narrative may not perhaps be strictly accurate. I am by no means certain that it is; but suppose that it is not—suppose that the jury or the conveyancer who drew this deed has in the narrative introduced a description of the different elements by which the gross sum is to be ascertained, and has inaccurately used phrases not altogether appropriate to the particular transaction which they describe, what does that come to? The thing which the railway company had to pay, and the thing which the owners of the land had to transfer by this compulsory process, was on the one hand £52,658 6*s.* 7*d.*, including this £9499 8*s.* 3*d.*, and on the other

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hand the lands and premises which were the subject-matter of the transaction.

Under those circumstances, my Lords, it seems to me to be beyond all doubt that that which is to be paid as stamp duty is the ad valorem stamp upon the transaction itself which conveyed from the one to the other that which by the process of this Act of Parliament is ascertained to be the value, and that is, under the express language of the 48th section, the value of the land. If it is the value of the land it cannot be doubted that the ad valorem stamp must be upon that value. It appears to me, therefore, beyond all doubt that the judgment of the Court below ought to be reversed, and that your Lordships ought to affirm the original judgment of the Commissioners, and I so move your Lordships.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Court of Session in this case cannot be sustained. The learned judges of the majority appear to me to have fallen into error from assuming that the Lands Clauses Act authorizes persons whose property is taken to claim, and compels railway companies to pay, something in the nature of personal damage. That view is very distinctly expressed by Lord Mure; but it appears to me to be entirely inconsistent with the provisions of the Act. As I read these provisions, the statute authorizes, in the first place, compensation for land, or an interest in land. By "compensation," is meant an equivalent for that which the railway company take and acquire, and which the proprietor gives up to them. Then, in the second place, these provisions contemplate damages for injury occasioned to lands which are not taken, by reason of the execution of the company's works upon the lands taken.

In this case the jury, following the terms of the claim which was lodged by the landowner in answer to the notice to treat given by the railway company, have found the former entitled to £9500 for loss of business. I do not think that claim would be sustainable, if the words in which it is described did correctly express the legal category to which the claim itself belongs. You cannot discover from the words which are used to describe the

sum that it was claimed as compensation for an interest in land; but I entertain no doubt whatever that it was meant to be so, and that it was so treated by the jury. In assessing the value of the property, or, in other words, the consideration which the railway company ought to pay for the land, or interest in land, which they take, it has become the practice of claimants to state the various items into which that price or consideration is capable of being resolved, and ask the jury to consider these separately.

When a proprietor instead of letting his land to a tenant occupies it himself for the purposes of trade, that is a special kind of occupancy which must be taken into account in estimating the value of the land; and the claim made here, which was affirmed by the jury to the extent of £9500, was obviously intended to cover the loss which Sommerville & Co. sustained by reason of their having to give up the occupancy of the saw mills which the railway company took for the purposes of their undertaking. Upon that footing it is an item of value which is rightly included in the price. In the view which the majority of the Court below seem to have taken of it, it was an item which could not be made matter of charge against the railway company. The Lord President points out what is perfectly true, that occupancy may be severed from ownership. The owner may let to a tenant and in that case the proprietor's claim would cover only the first two items in the finding of the jury. Upon the third item the railway company would in that case have to deal with the tenant and to satisfy his claim for loss of occupancy, which would be greater or less according to the duration of his lease. But, then, the learned judge goes on to say this, comparing the case of a proprietor occupying his own premises for the purposes of trade, with the case of his letting them to other traders: "Now, does it make any difference that the two characters of proprietor and tenant or occupier are combined in the same person, or does that circumstance of the combination of these two characters affect the nature of the compensation for loss of business which was awarded by the verdict of the jury? I think not." Upon that point I cannot come to the same conclusion as his Lordship. Occupancy is a right incidental to property: it passes with a disposition of property unless it has been severed from it by a lease, in which case

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the tenant's right becomes a burden upon that of the proprietor. The difference between the two cases—and, to my mind, the essential difference—is this, that in the one case the disposition of Sommerville & Co. carries the whole right of occupancy from the date of entry specified in the deed; in the other case it would not carry any right of occupancy until the expiry of the tenant's lease, and therefore no such item as this could have been claimed by the owner, had the currency of the lease been for a considerable period.

My Lords, it is argued that the sum of £9500 is not consideration for any right taken by the company or conveyed to the company by Sommerville & Co. If I am right in saying that it is a sum paid in respect of the company taking from them and becoming possessed of their exclusive right of occupancy, that is not so. The deed of conveyance, in which the consideration is inserted, gives the company the right of occupancy. So far as I know, it is their only title to it; and if Sommerville & Co. refused to give up possession, the railway company's remedy would lie in founding upon the deed of conveyance as giving them the right of occupancy: they have no other title, so far as I can see. In these circumstances, I cannot doubt that they have got in return for that sum the very subject, the very interest in the estate, for which it was intended that compensation should be given.

Upon these grounds I have come to the conclusion that the judgment of the Court below ought to be reversed.

Lord FitzGerald:—

My Lords, for the reasons given by the noble and learned Lord, the Lord Chancellor, and by the noble and learned Lord opposite (Lord Watson), I am of opinion that the interlocutor of the 22nd of January, 1886, by which the Court of Exchequer in Scotland determined "that the sum of £9499 8*s.* 3*d.* sterling is not to be reckoned part of the consideration for the sale on which the conveyance mentioned in the case was granted," should be reversed, and that the determination of the Commissioners of Inland Revenue should be restored.

The conveyance in question is undoubtedly a conveyance on

the sale of property whereby property was legally transferred to the railway company. What was the property so transferred? The lands in question, the conveyance of the lands carrying by its very force the right to the immediate possession, and thus determining the occupation of the vendor. From the conveyance the £9499 8*s.* 3*d.* seems to have been apportioned by the jury as compensation for loss of business. But how was that loss occasioned? The answer must necessarily be, by the determination on the conveyance of the vendors' right to the possession and occupation of the lands. The conveyance then appropriately goes on to say, "said three sums amounting in all to the sum of £52,658 6*s.* 7*d.*" That sum, no matter how you may subdivide it, no matter how you deal with it, is the price to be paid by the railway company in one shape or other for the right to the lands and the immediate occupation, and, in my judgment, forms the consideration for the sale.

LORD MACNAGHTEN:—

My Lords, I entirely agree. The Glasgow and South-Western Railway Company required to purchase and take for the purpose of their undertaking certain lands belonging to Messrs. Sommerville & Co., who were saw millers and timber merchants. Messrs. Sommerville & Co. were in occupation of those lands for the purposes of their trade. The railway company gave a notice to treat under the Lands Clauses Consolidation Act in the usual form. In answer to that notice Messrs. Sommerville & Co. sent in their claim: it was a claim in respect of those lands. That was the only claim they could make in answer to the notice to treat. They divided their claim into three heads. That, my Lords, was a convenient mode for enabling the jury to ascertain what was the sum proper to be paid under the circumstances; but still the sum however arrived at was purchase-money or compensation for the lands, and it was awarded as such; in fact, the jury had no power to award Messrs. Sommerville a single farthing except as compensation in respect of the lands.

Now the Lands Clauses Act prohibits a railway company from entering upon any lands, except by consent, until payment or deposit of the purchase-money or compensation agreed or awarded

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to be paid. It seems to me impossible to contend that the consideration for the sale of the lands was anything less than the full amount of purchase-money or compensation ascertained in accordance with the Act and required by the Act to be paid or deposited before entry.

Judgment appealed from reversed.

Determination of the Commissioners of Inland Revenue affirmed. Respondents to pay to appellants the costs of the appeal to this House and the costs below.

Lords' Journals, May 20, 1887.

Agent for appellants: *W. H. Melvill, Solicitor for England of the Board of Inland Revenue, for David Crole, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agent for respondents: *W. A. Loch, for John Clerk Brodie & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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CAIRD . . . . . APPELLANT;

AND

SIME . . . . . RESPONDENT.

Copyright—Lectures in Class-Room by Professor in a Scottish University—Right to restrain Publication.

A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author.

The appellant, a professor of a Scottish university, delivered lectures in his class-room as part of his ordinary course to students of the university, who were admitted on payment of the prescribed fees:—

Held, (Lord FitzGerald dissenting) that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that the appellant was entitled to restrain other persons from publishing them without his consent.

APPEAL from the Second Division of the Court of Session on an appeal by the respondent from a judgment of one of the sheriff-

substitutes of Lanarkshire, pronounced in two conjoined actions, in which the appellant, professor of moral philosophy in the University of Glasgow, was pursuer, and the respondent, bookseller of Glasgow, was defender.

The facts are fully set out in the opinion of Lord Watson, and it need only be here stated that the question intended to be raised was whether the respondent had a legal right to publish in the form of pamphlets certain literary compositions of the appellant, which were only delivered to the students of the University of Glasgow. The sheriff-substitute of Lanarkshire found (1) that the pamphlets were in substance reproductions of the professor's lectures; that the lectures were the property of the professor, and that the respondent had not shewn that the professor had in any way lost his right of property in them, or that the respondent had acquired from the professor the right to publish or reproduce them; and he ordered all copies of the publications to be delivered up. The respondent appealed to the Second Division, and their Lordships, on account of the importance of the case, ordered the parties to prepare minutes of their arguments, to be laid before all the judges for their opinions. The opinions of the consulted judges were returned on the 15th of July, 1885. There were two questions submitted, one of fact, and the other of law. The question of fact was whether the pamphlets were reproductions of large parts of the appellant's lectures. The question of law was whether a professor in a university has or has not the right to prevent his lectures being printed and published without his authority. The Lord President (Inglis), Lords Shand, Rutherfurd-Clark, Adam, Lee, Fraser, McLaren, Kinnear, and Trayner, held that in fact the publication was a reproduction; against that opinion were Lords Mure, Young, and Craighill. The Lord Justice-Clerk (Moncreiff) held it unnecessary to pronounce an opinion on the point. As to the question of law Lords Shand, Rutherfurd-Clark, Adam, Fraser, Kinnear, and Trayner held that a professor in a university had a right to restrain the publication of his lectures; while the Lord President, the Lord Justice-Clerk, Lords Mure, Lee, and McLaren held in the negative; Lord Young holding it unnecessary to

(1) 15 February, 1884.

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decide that general question, being of opinion that the publications complained of were not of a character to anticipate or prejudice a subsequent publication by the appellant himself of his lectures. Lord Craighill gave no opinion on the question of law, being content to rest his decision on the ground that no piracy has been committed (1).

On the 23rd of October, 1885, the Second Division delivered the interlocutor which is the subject of this appeal (2). Lord Rutherfurd Clark dissented from the form of the interlocutor, which was agreed to by the Lord Justice Clerk, Lords Young and Craighill.

On appeal,

1886. Dec. 6, 7, and 9. *The Solicitor-General for Scotland* (*Robertson*, Q.C.), Sir *H. Davey*, Q.C., and *F. W. Clark*, for the appellant:—

The interlocutor appealed from has not found the facts material to the case so as to comply with sect. 40 of the Judicature Act, 6 Geo. 4, c. 120. But it is not necessary to remit the case, for it can be dealt with as if the material facts had been specified (3). The majority of the judges of the Court of Session distinctly express the opinion, that the pamphlets in question were in fact a reproduction of the professor's lectures. Moreover, the opinion of the whole Court of Session having been taken, the Second Division was bound under 6 Geo. 4, c. 120, s. 24, to pronounce judgment in conformity with the opinion of the majority of all the judges consulted: *Stewart* v *Scot* (4); Lord Rutherfurd Clark (5).

Lorimer (of the Scotch bar), and *MacClymont*, for the respondent:—

It must be admitted that the publications complained of are in form and matter similar to the lectures; but a majority of the judges of the Court of Session were of opinion that it was a

(1) See for opinions in full, 13 Court Sess Cas. 4th Series, 23.

(2) Given post, p. 342.

(3) If it had been a case from one division only, the want of a specific finding of fact could only be supplied by a remit: *Wemyss* v. *Wilson* (1849), 6 Bell Ap. 394.

(4) March 11, 1836. 14 Court Sess. Cas. 1st Series, 692.

(5) 13 Court Sess. Cas. 4th Series, at p. 68.

question of law, whether a professor of a Scottish university is entitled to interdict the publication of lectures delivered by him to students in the university, so that, if it be decided that in law he has this legal right, the question of fact need not be determined.

[LORD HALSBURY, L.C.:—The House will hear counsel upon the question of law now; and the form the judgment will take will be settled hereafter.]

The Solicitor-General for Scotland (*Robertson*, Q.C.), Sir *H. Davey*, Q.C., and *F. W. Clark*, for the appellant:—

Every author has an uncontrolled power over his unpublished compositions, and ought to be the sole arbiter of their fate, to authorize or to prevent their publication: 1 Bell's Com. (7th edition), p. 111; Lord Cottenham in *Albert* v. *Strange* (1).

In *Jefferys* v. *Boosey* (2) Lord Brougham said: "The right of the author before publication we may take to be unquestioned. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation."

So also the Court will restrain the publication of letters: *Cadell and Others* v. *Stewart* (1804) (3). Oral delivery of his composition will not of itself deprive the author of his right: *Macklin* v. *Richardson* (1770) (4). There an injunction was granted to restrain the publication in a magazine of a farce which had never been printed, but which the author occasionally suffered to be acted (5).

(1) 2 De G. & Sm. 652; 18 L. J. (Ch.) at p. 126.

(2) 4 H. L. C. at p. 962.

(3) Mor. Dic. Lit. Prop. Ap. No. 4, *Cadell* v. *Robertson*, 5 Pat. Ap. 493.

(4) 2 Ambler, 694.

(5) In the American case of *Tompkins* v. *Halleck* (1882) (43 American Reports, 492), Mr. Justice Devens said: "Where persons are admitted as pupils or otherwise to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures." "*Bartlette* v. *Crittenden* (1847) (4 McLean, 300, and 5 Maclean, 32; S. C. 7 West. Law

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In *Abernethy* v. *Hutchinson* Lord Eldon said (1): "It is argued, Mr. Abernethy is not to be looked on as holding the same character with reference to a subject of this kind as a clergyman of the Church or a professor in a university; for, as I understand the affidavit which has been filed on the part of the defendant, Mr. Abernethy is represented not only as a surgeon, but as a person appointed by the governors and guardians of this hospital to give lectures: 'And this deponent said' (such is the language of the affidavit) 'that the surgeons and lecturers for the time being of such hospital are appointed by the governors of the said hospital.' Now if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures (2) for twenty years if there had been

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Times, 49), goes further" than *Abernethy* v. *Hutchinson* (3 L. J. (Ch.) 209): "It was there held that an author did not dedicate his manuscript to the public by using it to instruct others; and that even if he permitted pupils to take complete copies, they could not use such copies for publication. In these cases there was nothing wrongful in obtaining or keeping possession of the copies which had been permitted; it was the use sought to be made of them which was restrained." For case of letters see *Pope* v. *Curl* (2 Atk. 341), *Thompson* v. *Stanhope* (2 Ambl. 737), *Earl of Granard* v. *Dunkin* (1 Ball & Beat. 207), *Cadell & Davies* v. *Stewart* (1804) (Mor. Lit. Prop. Appendix No. 4), *Palmer* v. *De Witt* (1870) (S. C. New York, 3 Alb. L. J. 34; 2 Sweeney, 530, and aff. 1872; 2 Sickel's Rep. 532; 23 L. T. 823. *Lytton* v. *Devey* (7 Nov., 1884), 54 L. J. (Ch.) 293; *Howard* v. *Gunn*, 32 Beav. 462; *Gee* v. *Pritchard*, 2 Swan. 402. But may be published for receiver's vindication against a charge of forgery: *Percival* v. *Phipps*, 2 Ves. & B. 19.

(1) 3 L. J. (Ch.) at p. 214; 1 Hall & Twells, 28; *Lancet*, 1825–6, vols vii., viii., ix.

(2) The 1st edition of vol. i. of Blackstone's Commentaries was published in 1765, therefore, before *Millar* v. *Taylor* (1769), 4 Burr. 2303. In his preface the learned author says: "The truth is, that the present publication is as much the case of necessity as it is of choice. The notes which were taken by his hearers have, by some of them (too partial in his favour), been thought worth revising and transcribing; and these transcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous; some of which have fallen into mercenary hands, and become the object of clandestine sale. Having, therefore, so much reason to apprehend a *surreptitious impression*, he chose rather to submit his own errors

such a right as that: we used to take notes at his lectures; at Sir Robert Chambers' lectures also the students used to take notes; but it never was understood that those lectures could be published: and so with respect to any other lectures in the university; it was the duty of certain persons to give those lectures; but it never was understood that the lectures were capable of being published by any of the persons who heard them." Therefore, if it is the case that professors in a university have the same rights as a private lecturer, the judgment must be in the appellant's favour. *Abernethy* v. *Hutchinson* (1) was followed in *Nicols* v. *Pitman* (2). There Kay, J., referring to the Act 5 & 6 Will. 4, c. 65, s. 5 (3), said the case did not come within the section, as to notice to two justices, because it was a lecture delivered at a public college: "But if notice be not given, or if the place be a public school or college, or any public foundation, then the law relating thereto is to remain the same as if the Act

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to the world than to seem answerable for those of other men." See *Cadell* v. *Anderson*, 1787, Mor. 8310; Hailes, 1027, as to the copyright in Blackstone's commentaries after his death.

(1) 3 L. J. (Ch.) at p. 214; 1 H. & T. 28; *Lancet*, vols. vii., viii., ix.

(2) 26 Ch. D. 374.

(3) Sect. 1 of the Act of 5 & 6 Will. 4 (1835), c. 65, enacts: "That the author of lectures or his assignees, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right of publishing such lectures, and every person who may take down the same in shorthand, or in any other way obtain a copy of the lectures, and publish them without leave of the author or his assignees, shall be liable to a penalty."

Sect. 2 imposes the same penalty on newspapers publishing lectures without leave.

Sect. 3: No persons allowed for certain fee, or otherwise, to attend lectures, shall be deemed on that account to have leave to publish such lectures.

Sect. 4 provided that nothing in the statute is to prohibit the publishing of lectures after the expiration of the copyright given by statute of 8 Anne, c. 19, and 54 Geo. 3, c. 156, or to any lectures which have been printed or published before the date of the Act —9th of September, 1835.

Sect. 5: Provided that nothing in the Act shall extend to any lectures or the publishing of any lectures, or part thereof, of the delivering of which notice in writing shall not have been given to two justices within five miles from the place where such lecture shall be delivered two days at least before delivering the same, "or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation; and that the law relating thereto shall remain the same as if this Act had not been passed."

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had not been passed. That is the law as laid down by Lord Eldon, and it is the law I am bound to administer in this particular case."

The national character of the universities and that each chair is munus publicum is conceded. It is also true that the universities are open to all who comply with the regulations: *Greig* v. *University of Glasgow* (1); but the students are received for instruction and education. They must be matriculated and enrolled in a class, and there is also a fee which must be paid. And a member of the public who does not comply with these conditions has no right to be present. And the question is, had the students, plus personal instruction, the right to publish for gain the professor's lecture.

The judges of the Court of Session decided that the class was a public audience, because the professor had no power of selecting the students who attended his lectures, and also because all the world could resort to the university. That, however, does not make the professor's class a public audience. The duty of a professor to his class is to personally instruct them, and no more, and the students are entitled to take notes for the purpose of their individual instruction, and have no higher right. If the students had a right to publish the lectures and did so, the professor would be for ever debarred from publishing the result of his own literary labours (2).

(1) Law Rep. 1 H. L., Sc. 348.

(2) In France the Cour Royale of Paris had before it, in 1828, the question whether, when a course of oral lectures is merely the reproduction of a work previously published by the professor, a person who publishes the lectures from notes can be made responsible for a piracy to the publisher of the work thus reproduced. The decision was in the affirmative: see Curtis on Copyright, note, p. 103; Renouard, tom. 2, p. 146. On the 12th of December, 1771, Dr. Wm. Cullen, Professor of Medicine in the University of Edinburgh, commenced a Chancery action before the Lord Chancellor, Lord Apsley (Bathurst) against the publisher Lowndes of Fleet Street, for an injunction to restrain Lowndes from selling a book purporting to be "Lectures on the Materia Medica" as delivered by William Cullen, M.D., Professor of Medicine in the University of Edinburgh. The plaintiff's bill, which is preserved in the Record Office (Woodford, 1758 to 1800 No. 1033), narrates that in the latter end of the year 1761, the professorship of medicine in the university being then vacant by the death of Dr. Alston, and it being about the time when by the rules of the university the lectures on medical subjects ought to begin, and

Lorimer, and *MacClymont*, for the respondent:—

The substantial question is whether, in the case of lectures delivered in a university there is a publication to the world?

The pursuer is a person different from a private lecturer. He is a university professor, a person clothed with a public office, under an obligation to deliver lectures to students members of the public. Any man is entitled to matriculate in the university, and to demand admission to the professor's lectures, on payment of the fee fixed by the university authorities. The professor cannot refuse to teach, nor decline admission to a matriculated student tendering the fee. There is no express right to attach conditions to class attendances, and such a right cannot be implied. The students attend the lectures in the exercise of a public right; and from the time of delivery the lectures become public. It is admitted that the students might read, repeat, or lend copies of the lectures to others; and reproduction on a larger scale and for profit can make no difference in principle. The university exists for national ends and the diffusion of knowledge, which knowledge is not to be confined to the students. It is an accident that the knowledge has been conveyed by lectures, it might have been given by question and answer.

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the plaintiff being then professor of chemistry in the same university, he offered his services to the university to read a course of lectures on the materia medica to the students for the season, and which offer being accepted, the plaintiff did accordingly compose a course of lectures on the materia medica, and did at the end of 1761 and the beginning of 1762 read the same in the public school of the university, which lectures were attended by a great number of students. That the plaintiff had ever since in his custody the manuscript of the lectures. The bill then alleges that Lowndes had fraudulently and surreptitiously obtained a copy of the lectures so read, and had printed them without the plaintiff's knowledge or consent. The Lord Chancellor granted an injunction the 13th of December, 1771 (Order A., No. 16). In Mr. John Thompson's life of Dr. Cullen (ed. 1832, p. 143 and Q appendix, p. 611, and ed. 1859, p. 617), a letter is given from the physician who furnished the MSS. to Lowndes, stating that he did so that the lectures should not be lost. Dr. Cullen having received this information allowed the sale of the book to proceed: see additional preface to "Materia Medica" by Dr. Cullen, London, 1773, and Dr. Cullen's own book on the same subject 1789: both in the British Museum.

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[LORD HALSBURY, L.C. :—If done in that way, the questions and answers could not be published without the consent of all those who were parties to them (1).]

In *Jefferys* v. *Boosey* (2) Lord Brougham said an author could not do an act which necessarily involved dedication to the public and yet keep exclusive possession of the thing dedicated, and retain all the rights he had before dedication (3). And Lord St. Leonards was of opinion that the case of an author and that of an inventor of a machine were the same, that "once the inventor has disposed of a single copy, it may so far as the common law is concerned be copied by any person who properly obtains possession of it" (4). Suppose the professor of applied mathematics delivers during his address an exposition of a new machine, the students have a right to be there, and they had also the right to diffuse the knowledge to the public. Could the machine be protected by patent?

By the common law of both Scotland and England an author has no protection after publication: *Midwinter* v. *Hamilton* (1748) (5); *Hinton* v. *Donaldson* (1773) (6); *Cadell and Davies* v. *Robertson* (1811) (7); *Jefferys* v. *Boosey* (1854) (2), overruling *Millar* v.

(1) In *Hinton* v. *Donaldson* (1773), Mor. Dic. 8307, Hailes, 537, 5 Pat. Ap. 507, before *Donaldson* v. *Becket* in the House of Lords, 1774, Lord Auchinleck said, as to lectures delivered orally, "If a man once speak out a sentiment, he communicates it to his hearers, and it is theirs for ever." Homer's works were preserved by memory for many years; so were the works of Ossian: and the poem of Chevy Chase. Was there any copyright in it after the author had let one man learn it by heart? As to extempore compositions, such as sermons, when, as was common, people took them down in writing, as some of them were very good; had the preacher any property in these sermons? "He could have none in the writing, for he never had written himself. Could he have said they were only intended for his own congregation, and were not to be communicated to others. I apprehend the proprietor of these was the person who wrote; for the author was not able to repeat what was in the copy:" see, also, *Canham* v. *Jones* (1813), 2 Vesey & Beames, 218. Sir Thomas Plumer refused to grant an injunction as the recipe claimed was not in writing: see, also, *Newbery* v. *James*, 2 Merivale, 446; *Perceval* v. *Phipps*, 2 Ves. & B. 19.

(2) 4 H. L. C. 815.

(3) 4 H. L. at pp. 967.

(4) Ibid. at p. 977. See also Mr. Justice M'Lean in *Wheaton* v. *Peters*, 8 Peter's Rep. S.C. United States, 591, at p. 658.

(5) Mor. Dic. 8295.

(6) Mor. Dic. 8307; 5 Pat. App. 507; Hailes, 535.

(7) 5 Pat. App. 493.

Taylor (1769) (1); see also *Donaldson* v. *Becket* (1774) (2). And just as after printing the author cannot confine the reading of the book to the identical purchaser, in the same way the lecturer after publication to his class cannot limit the communication to each individual student. The decision in *Abernethy* v. *Hutchinson* (3) was based upon an implied contract. Moreover the injunction in that case was dissolved on motion by the defendant on the 28th of November, 1825 (4), after affidavit of service of notice of the motion had been read.

In the *Abernethy Case* (3) Lord Eldon said he had great doubts whether oral lectures were capable of property, and that is one of the points here.

[LORD WATSON:—That point is not raised by your pleadings.]

Macklin v. *Richardson* (5) does not apply, as that case fell under contract; tickets were issued for the theatre, and although the play was not printed the author had clearly retained within his own control his own property.

The Act 5 & 6 Will. 4, c. 65, passed ten years after the *Abernethy Case* (6), is clearly in the respondent's favour. It assumes in the preamble, not only that the lectures are delivered but apparently delivered without remedy, which was a great "detriment" to lecturers. It then proceeds to create a new

(1) 4 Burr. 2303, and published in 1770 separately under title "Literary Property."

(2) 2 Brown P. C. 129; 4 Burr. 2408.

(3) 3 L. J. (Ch.) 209.

(4) Record Office, 1825, Order A., No. 40, Registrar Walker. The affidavit upon which the application to dissolve the injunction was made is extant in the Public Record Office A. 1825, No. 6, and is dated the 22nd of November, 1825. Its main purpose was to shew that Mr. Abernethy could not lecture in St. Bartholomew's Hospital if he did not hold the appointment of surgeon thereto. The affidavit is made by the defendant Hutchinson and states, inter alia, "that as evidence that the duty of delivering lectures in St. Bartholomew's Hospital is part of the duty of the plaintiff as surgeon to that institution, the deponent hath been informed that the plaintiff hath lately tendered his resignation of his office of surgeon to the governors of the hospital, but that such governors refused to accept the resignation, unless the plaintiff also at the same time ceased to deliver lectures there:" see for full report of this case *Lancet*, 1825–6, vols. vii., viii., ix.; *Lancet*, 1828–9, vol. i. And *The Times*, 1824, Dec. 20, 21: 1825, June 11, 13, 16, 18, and Nov. 29.

(5) 2 Amb. 694.

(6) 3 L. J. (Ch.) 209.

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right, namely, to create a copyright in a delivered lecture, and to protect the right by penalties. The Act takes express notice of persons attending lectures on payment of fees, and enacts this shall not import a license to copy and publish. It is then provided that the Act shall not extend to alter the law relating to lectures in a university.

The *Solicitor-General for Scotland*, in reply.

Time having been taken, judgment was delivered as follows:—

LORD HALSBURY, L.C.:—

My Lords, in this case I have had much greater difficulty in dealing with the question of form than with the substantial question between the parties which it was intended to raise by this appeal. It is, I think, manifest that the interlocutor does not comply with the provisions of the Judicature Act of 1825, and I cannot but regret that the suggestion of Lord Rutherfurd Clark was not adopted, by which that which was fact would have been found as fact, and the question of law, which alone under that statute is open to your Lordships to review, would have been left to be determined. Nevertheless, although with some doubt, I have come to the conclusion that your Lordships may treat the questions of fact as having been determined, and the questions of law as sufficiently severed from those questions of fact to enable your Lordships to pronounce a final judgment between the parties.

My Lords, the question which it was intended to raise was the legal right of the respondent to publish, in the form of a pamphlet, certain literary compositions of the appellant, which were orally delivered to the students of the University of Glasgow attending his class. A majority of the Court has determined that the pamphlet in question is a reproduction of the appellant's literary composition; and I do not stop to discuss what some of their Lordships appear to have considered important, that in respect of certain particulars it was a blundering and unsuccessful reproduction of the appellant's work. I confess I am unable to understand what place such topics find in the argument. Assume an unlawful

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reproduction of an author's literary work; it does not become less an injury to the legal right because the reproducer has disfigured his reproduction with ignorant or foolish additions of his own. It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others. The case of private letters which, though conveniently described by the word "private," involve publication of a certain kind to others than the author of them, is an illustration of a communication which does not permit the infringement of the proprietary right which could be involved in their unauthorized general publication. The doubt which I have entertained in the course of the argument has been whether the extent and degree of publication in the case now under debate was not a question of fact which should have been determined on the evidence before the Court, and which if it had been determined would not have been open to your Lordships to review. But, as I have said, I have come to the conclusion that in the form in which it has arisen it may be treated as a question of law, that is to say, whether on the agreed state of facts such a publication as is proved here must as a matter of law deprive the author of the literary composition in question of his proprietary right, and whether the fact that he is professor of moral philosophy, teaching in his class-room by the literary composition which is now the subject of debate, makes his delivery of that literary composition necessarily public to the whole world, so as to entitle any one who heard it to republish it without the permission of its author.

Now, my Lords, I have designedly used the phrase "literary composition" to avoid the ambiguity of the word "lecture," because I think the word "lecture" involves an assumption which may give rise to error. If by it is signified a lecture delivered on behalf of the University, and, so to speak, as the lecture of the University itself, as the authorized exposition of the University teaching, I can well understand that by the nature of the thing, from the circumstances of its delivery, and the object with

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which it was delivered, it would be impossible to say that it was intended by those on whose behalf the professor was lecturing or by himself to limit the right of communication to others. Whether that limitation of the right arises from implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation. But without using any phrase which by force of its ordinary meaning implies either a kind of publication or involves a limitation of the right of publication, what are the facts here as found by a majority of the Court? A teacher is in his class-room with his students. For the purpose of teaching them he uses a composition of his own, in this case called "The Law of Moral Philosophy." Suppose it had been exercises in grammar, arithmetic, or foreign language. The object and purpose is to teach the students, to enable them to become proficients in the various subjects of which the teacher is the professor. The student is entitled to avail himself of the teaching. The object is to make him a good grammarian, a good arithmetician, or a proficient in the particular language that is taught. But could it be contended that by reason of such communication to such students each of them was entitled to publish the professor's exercises, dialogues, dictionary, or the like? My Lords, it seems to me that it might be, and indeed there is some suggestion here that it is, contrary both to the spirit and meaning of what is called a lecture that students should be supplied with some mode of answering questions on the subject of their lectures, without that process of mental digestion which is intended to form the substance of the teaching. Illustrations might be infinitely multiplied in which the whole purpose of a professor's teaching might be rendered nugatory by the unauthorized reproduction of his modes of teaching.

The ground on which I have been able to come to the conclusion that the particular form of literary composition, and the degree of communication which is established to a limited class,

may be treated as a question of law is, that it appears to have been decided that, notwithstanding the professor's desire to prevent such reproduction, and contrary to his intention, the delivery of his lecture—of his composition—to a limited class of students, operates, as matter of law, to make his composition public, and to prevent his enforcing any proprietary right.

My Lords, I am not aware of any university regulation, or any bargain with its professors, which either expressly or impliedly enforces on the professors the making public of their literary compositions, of whatever class these compositions may be, and whether merely educational and intended for the use of their students, or intended for mere general diffusion. I am disposed to think, although it does not become necessary to discuss it in the present case, that if a professor had entered into a specific bargain to make public the lectures which he was delivering to his students, but, contrary to that bargain, had enforced on his students the condition of secrecy, though the university which employed him on that express bargain might be at liberty to seek their remedy against him for a breach of his undertaking, it would not necessarily make public that which the lecturer himself had neither expressly nor impliedly communicated for general reproduction.

My Lords, I doubt whether any of the cases which have been brought to your Lordships' attention do more than establish the two propositions which, as I have said, cannot now be in debate. The application of the principles laid down in these cases is what gives rise to the matter now in discussion. I do not think it very important to consider what was the ultimate result of Mr. Abernethy's appeal to Lord Eldon, because the ground of Lord Eldon's decision as originally given seems not to have been affected if an arrangement between the parties, as seems probable, put an end to the litigation.

With respect to the Act, 5 & 6 Will. 4, c. 65, I am not prepared to say that I can obtain any light from its provisions. I had at one time an impression that there was something in the nature of a declaration by the legislature that lectures delivered in a university, or a public school, or any public foundation, were to be assumed to be so published as for the future to become public

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property; and if that were assumed to be the construction of the statute a serious question would arise as to what were lectures within the meaning of that statute. But I am now satisfied that the language of the statute has been adopted by the legislature for the purpose of not interfering in any way with the law existing on the subject. Possibly it may be that the difficulty of defining what should be a lecture may have occurred to the author of the statute, or the impolicy of affecting to lay down a rule where many circumstances of convenience as to modes of instruction and so forth might be appropriately left to the University authorities, may have produced the legislation which in fact exists. At all events I can devise no assistance from a statute which professes to leave the law as it is without professing to give any hint of what it assumes the law to be.

I am therefore of opinion that the appellant ought to succeed, and I concur in the suggested form of judgment which has been prepared by my noble and learned friend Lord Watson, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, this appeal is taken in two conjoined processes instituted in the Sheriff Court of Lanarkshire by the appellant, who is professor of moral philosophy in the University of Glasgow, for the purpose of having the respondent, a bookseller in that city, interdicted from publishing or advertising for sale certain books or pamphlets, entitled "Aids to the Study of Moral Philosophy," on the ground that these works are mere reproductions of the lectures delivered by the appellant to the students who attend his class in the University. In defence the respondent pleads in the first place that the publications sought to be interdicted are not substantially the same with the appellant's lectures, but represent the views of the person who compiled them, and are the result of his independent study and research; and, in the second place that the delivery of the appellant's lectures in the class-room of the university is equivalent to publication, and that he has consequently lost his right to prevent their publication in a printed form. These defences raise two issues, the first being a question of fact, which if

the actions had originated in the Court of Session would have been appropriately tried before a jury, the second being a question of law.

Proof was led by both parties; and thereafter, on the 15th of February, 1884, the sheriff-substitute granted perpetual interdict as craved, and ordained the respondent to deliver up to the appellant all copies of the publications complained of remaining in his hands or within his control. The learned sheriff-substitute, by his interlocutor of that date, found that "the said books or pamphlets are in substance reproductions, more or less correct, of the lectures in use to be delivered by the pursuer to his class of moral philosophy in the University of Glasgow;" and he further found that "the said lectures are the property of the pursuer, and that the defender has not shewn that the pursuer has in any way lost his right of property therein, or that he has acquired from the pursuer, or in any other lawful way, a right to publish or reproduce said lectures."

The respondent appealed to the Second Division, who ordered the cause, with minutes of debate, to be laid before the whole judges of the Court for their opinion. The result was that, of the thirteen consulted judges, a majority of nine were of opinion that the respondent's publications are substantially a reproduction of the appellant's lectures. Six judges (Lords Shand, Rutherfurd Clark, Adam, Fraser, Kinnear, and Trayner) held that the appellant has a right of property in his delivered lectures; whilst five judges (the Lord President, the Lord Justice-Clerk, and Lords Mure, Lee, and McLaren) came to the opposite conclusion. Lord Young, although he did express some views unfavourable to the appellant, distinctly intimated that he did not think it necessary to decide, and did not decide, the question, being of opinion that the appellant's right, assuming it to exist, must be limited to a right to protection "against any publication which may be reasonably held to anticipate or otherwise substantially or prejudicially interfere with a subsequent publication by himself," and that the publications complained of are not of that character. Lord Craighill expressed no opinion whatever upon the matter of right, holding that the view taken by the minority (of which his

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Lordship was one) upon the question of fact was a sufficient ground of judgment.

The case was advised on the 23rd of October, 1885, when the Second Division pronounced the interlocutor which is now brought under review. It contains the following findings: "Find that the pursuer is professor of moral philosophy in the University of Glasgow, and that the lectures referred to in this record were delivered by him to his students, as part of his ordinary course. Find that the defender, who is a bookseller in Glasgow, published the works now complained of. Find that these works were compiled by a student who had attended the class taught by the pursuer, and also had taken notes in shorthand of the pursuer's lectures." These are in all respects proper findings, although they set forth facts which were not seriously disputed. The important part of the interlocutor follows: "But find, in conformity with the opinions of the majority of the whole Court, that such publication did not constitute an infringement of any legal right of property or otherwise belonging to or vested in the pursuer, therefore dismiss the appeal," &c.

The last finding of the interlocutor does not comply with the requirements of 6 Geo. 4, c. 120, s. 40, and is beset with ambiguity. It suggests either that a majority of the Court held that there was no infringement, or that a majority were of opinion that there was no right capable of being infringed; but in point of fact there was not a majority in favour of either of these propositions. Lord Rutherfurd Clark protested against the terms of the interlocutor as not being in accordance with the provisions of the Judicature Act of 1825; but he was overruled by the other judges of the division, whose reasons for the course they followed I am at a loss to understand. Apparently they meant to find that, on some ground or other, a majority of the whole judges were of opinion that interdict should not be granted, such majority being obtained by combining two minorities. It may be doubtful whether Lord Craighill's opinion upon the question of fact should have been taken into account in deciding the case, seeing that it had been negatived by a large majority; but, in the present state of the case, it is unnecessary for your Lordships

to consider that matter. Whether judgment was given for or against the appellant, it was the statutory duty of the Court to insert a finding of fact in their interlocutor, expressing the opinion of the majority of the consulted judges upon the question of infringement, for the guidance of their house. Your Lordships are, by the terms of the statute, precluded from reviewing the interlocutor of the 23rd of October, 1885, except in so far as it "depends on or is affected by matter of law," and the only question which can be competently raised and decided in this appeal is that which relates to the existence of the appellant's alleged right of property in his lectures. It would have been idle to entertain that question if the Court below had come to the conclusion that, assuming such a right to exist, the respondent's publications did not constitute an invasion of it. Fortunately, in the present case, the conclusion of the majority of the whole Court upon the question of fact is beyond dispute; and the ministerial duty of the Second Division to give effect to that conclusion by a finding in their judgment is equally plain. In these circumstances, your Lordships did not think it expedient or necessary to subject the parties to the delay and expense which would have been occasioned by remitting the cause, in order to have the interlocutor put into proper shape, and permitted them to be heard, on the merits of the appeal, as if the interlocutor had contained an express finding to the effect that the publications complained of are in substance a reproduction of the appellant's lectures.

The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since the case of *Jefferys* v. *Boosey* (1) was decided by this House in the year 1854, it must be taken as settled law that, upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide

(1) 4 H. L. C. 815.

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is, whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. "He has" (as was said by Lord Brougham in *Jefferys* v. *Boosey* (1) "the undisputed right to his manuscript; he may withhold or he may communicate it, and communicating it he may limit the number of persons to whom it is imparted and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." He cannot print and sell without publishing his work, but he may legitimately impose restrictions which will prevent its publication, whether the communication be made by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right depends upon its being either matter of contract or an implied condition, that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit, and for the information of the public at large. Upon that principle it was decided in *Macklin* v. *Richardson* (2) that the fact of a play having been acted for several years in a public theatre with permission of the author did not imply an abandonment of his right, and that he was therefore entitled to restrain its publication from notes taken by a shorthand writer who had paid for admission to the theatre. On the other hand I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons or selection or restriction of his hearers has, as the Lord President observes in this case, "abandoned his ideas and words to the use of the public at large, or in other words has himself published them."

The main argument addressed to your Lordships for the respondent was to the effect that a professorship in a Scotch university being munus publicum, and the occupant of the office being

(1) 4 H. L. C. at p. 962. (2) 2 Amb. 694.

under an obligation to receive into his class all comers having the requisite qualification, his lectures are really addressed to the public, and at all events that there is no room for inferring that the students are taught under an implied condition that they shall not print and publish his lectures either for their own profit or otherwise. I do not think it can be disputed that, as stated by Lord Shand, this is the first occasion in the history of the Scottish universities on which any such right as that now claimed has been asserted. If the claim be well founded there can be no copyright in a lecture which has been once delivered in the class-room. Yet it is the fact that professors and their representatives have been in frequent use to publish lectures which had been annually delivered for years before such publication, and have enjoyed, without objection or challenge, the privilege of copyright. That has been notably the case with our great academical teachers of moral and mental philosophy, from Dr. Thomas Reid, who was appointed to the chair now held by the appellant in 1763, to the late Sir William Hamilton. I concede that, although such may have been the prevalent understanding in Scotland as to the professor's right, this is not a case in which it can be said that communis error facit jus; but I agree with Lord Shand's observation that, in these circumstances, effect ought not to be given to the respondent's argument unless he can make it clear "in principle or authority that the law gives him the right he claims."

In the Court below there was a good deal of discussion as to the practical result of deciding this case one way or another. I am afraid that I do not estimate so highly as some of the learned judges the advantage of having the professor's lectures printed and subjected to the criticism of public opinion. The capable critics are a small and by no means unanimous section of the community; and I doubt whether the governing body of the University or the professor would derive any assistance from their strictures; whilst experience has shewn that the public who are interested in it are not ignorant of the character of university teaching. An original thinker and able teacher very soon attracts a large class and vice versâ. I certainly do not appreciate the advantage to the public of furnishing (which is the professed

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object of the respondent) the appellant's students with a "crib"; an aid to knowledge forbidden in well regulated educational institutions, which, as the Lord Chancellor has already pointed out, supersedes the necessity of intellectual effort and neutralises the benefit of the professor's tuition. There appeared to me to be some force in the suggestion of the appellant's counsel, that if it be now held for the first time that delivery of his lectures is publication, the professor may in future (contrary to his present practice) hesitate to communicate his best and most original thoughts to his class, before they have been matured and given to the world by himself. But I do not think these considerations, however important they may be in themselves, are decisive of the present question.

As to the position of students attending the appellant's class, it is sufficient to say here that they must be members by matriculation of the University, and they must also be enrolled as members of his class for the session, upon payment of the prescribed fee. A member of the public, as such, has no right to be present at his lectures; and the public has no right to interfere with or control his teaching. By sect. 5 of the Universities (Scotland) Act of 1858, the duty of superintending and regulating the teaching and discipline of the University is committed to the senatus academicus (which is a body consisting of the principal and whole professors of the University) subject to the control and review of the University Court.

The leading, if not the only case having a close analogy to the present is *Abernethy* v. *Hutchinson* (1), decided by the Lord Chancellor (Lord Eldon) in the year 1825. It is true that in that case there were features which do not occur here. It appeared upon the affidavits made by Mr. Abernethy in support of his application for an injunction against the publication of his lectures at St. Bartholomew's Hospital, that it was no part of his duty as one of the surgeons of the hospital to deliver these lectures, which were not in any way open or accessible to the public, and were not attended by any person save by his permission. At the first hearing Lord Eldon entertained some doubt whether there could be satisfactory evidence of the substantial identity of the

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

publication sought to be restrained with the plaintiff's lectures, seeing that these had not been written out at full length, but were delivered orally from notes, and his Lordship also desiderated evidence of the way in which the defendants obtained possession of the matter which they had printed. The motion for an injunction was accordingly delayed, the learned judge observing, "In the meantime Mr. Abernethy may, if he thinks proper, produce his MSS., and on the other hand, the defendants will judge for themselves whether they will or not,—and I do not require it of them because I have no right,—inform me of the way in which they became possessed of the means of publishing this work." Upon the first of these points his Lordship was satisfied by the production of the notes from which the lectures had been delivered, with an explanatory affidavit. The defendants did not respond to the invitation addressed to them, and his Lordship, in the absence of direct evidence, came to the conclusion that they must have obtained the lectures from some person who had attended them, or in some other way in which the Court could not approve. Accordingly a perpetual injunction was granted, on the ground that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use.

I may here observe that, in the course of the argument for the respondent, Mr. MacClymont brought under your Lordships' notice the fact that the record in *Abernethy* v. *Hutchinson* (1) shews that the injunction was dissolved by the Lord Chancellor within a few months after its issue, upon a motion by the defendants, and without hearing parties. We were told that no trace had been found of the affidavit on which the motion was made, so that the recall of the injunction may have been the result of an arrangement between the parties, and at all events it cannot detract from the weight of Lord Eldon's deliberate judgment causâ cognitâ.

In my opinion the reasoning upon which Lord Eldon's judgment is based applies strictly to the case of a professor in a Scotch university. The principle which pervades the whole of

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

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that reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture, to the extent of taking it down in shorthand, for their own information and improvement, but cannot publish it. If that be the real character of the relation between the lecturer and those whom he addresses, it is immaterial whether they are selected by himself or by others, so long as it is matter of express stipulation, or of reasonable implication, that the duty which he undertakes is limited to giving personal instruction to the individuals composing his audience. Some of the learned judges in the Court below seem to have been of opinion that the present case cannot be brought within the principle of *Abernethy* v. *Hutchinson* (1) because there is nothing in the nature of a contract between the professor and his students, and therefore there can be no implied contract that they shall not publish. That may be so; but what Lord Eldon held was, that the restriction of the hearers' right to use the lectures arose from the relation established by contract between them and Mr. Abernethy. In that case, the restriction necessarily became an implied term of the contract; but the condition itself is the legal consequence of the relation in which the parties stand to each other, and must receive effect, wherever a similar relation exists, whether it be established by contract or in any other way.

I do not think that students of moral philosophy in the University of Glasgow, or in any other Scotch university, either are, or can with propriety be said to represent the general public; of course they are, each and all of them, members of the public; but they do not attend the professor's lectures in that capacity. They must be members of the University, and they must further comply with its regulations and make payment to the professor of the usual fee, in return for which they receive from him a ticket or certificate of their enrolment as students for the session; and, without observing these preliminaries, they would have no right to enter his class-room during the lecture hour. The relation of the professor to his students is simply that of teacher and pupil;

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

his duty is, not to address the public at large, but to instruct his students; and their right is to profit by his instruction, but not to report or publish his lectures. It appears to me that the learned judges whose opinions are adverse to the appellant have attributed undue weight to the circumstance that the appellant's office is munus publicum. That it is so is an undoubted fact; but, according to my apprehension, the question which your Lordships have to decide depends, not upon that fact, but upon the duty which the appellant's office requires him to fulfil. The nature of the duty incumbent upon a professor in an English university is thus described by Lord Eldon, in *Abernethy* v. *Hutchinson* (1): "Now if a professor be appointed, he is appointed for the purpose of giving information to all his students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures." So far as I know, there is no difference whatever between the position of a Scotch and that of an English university professor, so far as regards their relations to the students whom they teach; and no point of difference has been suggested, either in the Court below, or by the respondent's counsel. The fact of his being a public official, lays the appellant under an obligation to the State as well as those who pay for their instruction, to teach efficiently, and to the best of his abilities; it does not affect the nature of his obligation, and cannot alter the relation between him and his students.

That Lord Eldon held the lectures of a university professor to be within the rule laid down, and given effect to by him, in *Abernethy* v. *Hutchinson* (1), is beyond question, because he expressly refers to the case of such a professor as an illustration of the legal principles upon which he gave judgment for Mr. Abernethy. None of the learned judges who are of opinion that the doctrine of *Abernethy* v. *Hutchinson* (1) is inapplicable to this case, advert to that part of his Lordship's judgment, with the single exception of Lord McLaren, who states, in my opinion correctly, that Lord Eldon "very distinctly and emphatically identifies the case of Mr. Abernethy with that of the lectures of Blackstone, originally delivered by that great lawyer in the University of

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

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Oxford, in which he held the appointment of Vinerian Professor of Law." Lord McLaren suggests, however, that there are no means of knowing whether the attention of the Lord Chancellor "had been drawn to the distinction which might be taken between public and private lectures, a distinction on which the main argument of the defender is founded." I cannot, for many reasons, concur in Lord McLaren's suggestion. Lord Eldon, in the passage referred to, was distinguishing between lectures public in this sense, that they are communicated urbi et orbi by the mere act of delivery, and lectures which are private, inasmuch as the author does not by their delivery communicate his ideas and language to the public at large, or part with his common law right of property. It was not the habit of Lord Eldon to overlook such obvious differences as did exist between the position of Mr. Abernethy and that of Sir William Blackstone; it is manifest that his Lordship was clearly of opinion that these differences could not disturb the application of the same principles of law to both cases alike. In that opinion I entirely coucur.

The observations of Lord Eldon assume that Sir William Blackstone would not have had copyright in the text of his Commentaries if the lectures delivered by him as Vinerian Professor were held to have been thereby published. The accuracy of that assumption is controverted by my noble and learned friend Lord FitzGerald. Never having seen the lectures, I can only say for myself that in the preface to the first edition of the Commentaries, published in 1765, the learned author states that "the following sheets contain the substance of a course of lectures on the laws of England which were read by the author in the University of Oxford." Lord Eldon heard and took notes of the lectures, and was no doubt familiar with the Commentaries; and he was therefore in a position to judge (which I am not), and was perfectly capable of judging, whether the two works were substantially the same. If they were, the statute of Anne could give the author no copyright in the original text, although he might acquire the copyright of new matter added to subsequent editions of the Commentaries.

In regard to the Act 5 & Will. 4, c. 65, I adopt the opinion of

the great majority of the learned judges, which is in accordance with the view taken by Mr. Justice Kay in the recent case of *Nicols* v. *Pitman* (1). The effect of the statute is to secure their right of property to authors of lectures, and to persons to whom the right has been sold or conveyed, notwithstanding delivery, upon their compliance with certain preliminaries; and their right is protected from invasion by forfeitures and penalties. Its provisions are not confined to cases in which the right would have been protected at common law, but extend to many cases in which, according to that law, delivery would have been equivalent to publication. But, by sect. 5, lectures delivered in a university, or a public school, or in any public foundation, are excepted from the operation of the Act, and it is declared "that the law relating thereto shall remain the same as if this Act had not been passed." I cannot gather from the terms of that exception and declaration any indication of an intention on the part of the legislature to express their understanding of the existing law with respect to lectures in these institutions. There may be lectures delivered within the walls of such institutions which do by their delivery become public property, just as there may be others which do not. Whether they belong to one or other of these classes is a question which must be decided irrespective of the provisions of the statute.

I am accordingly of opinion that the appellant is entitled to have the judgment of the Second Division, in so far as adverse to him, reversed, and to have the interlocutor of the sheriff-substitute restored. [His Lordship then read the form of order, as given below.]

LORD FITZGERALD:—

My Lords, the question we have to determine on this appeal seems to me to be one of pure law. I agree with my noble and learned friend (Lord Watson) that we must read the interlocutor of the Second Division as if it contained an express finding that the publications complained of are in substance a reproduction of the appellant's lectures.

It was not contested that by the common law of Scotland, as

(1) 26 Ch. D. 374.

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well as by the common law of England, every author has a right of property in his compositions so long as they remain "unpublished," and that a private lecturer may lawfully impose an express condition on persons allowed to hear his lecture, that they shall not publish what they hear, and that such a condition may also be lawfully implied from the circumstances. In such cases the common law protects the author's right of property and forbids infringement. On the other hand, a private lecturer may deliver his lecture under such circumstances as indicate his intention to give his words to the public at large. In the latter case the lecturer has technically published his lecture, and has abandoned the protection which the common law would otherwise afford. We have now, however, to deal with a case very different from that of any private lecturer.

The facts, as to which there is no dispute, are that the pursuer fills the chair of moral philosophy in the University of Glasgow. It is not necessary to investigate the history of that university, as its status is now in substance similar to that of the other universities of Scotland. They are all ancient public endowed corporations established by public authority for the special purpose of public instruction in theology, law, medicine, and all the arts. In that instruction the public at large has a deep and direct interest. For an outline of the University, and the office of its professors, and their functions and duties, I refer to the eloquent judgment of the Lord President. In point of modern regulation and government they all come under the provisions of the imperial statute 21 & 22 Vict. c. 83, which is a statute "for the advancement of religion and learning, and to make provision for the better government and discipline of the universities of Scotland." The University of Glasgow has under that Act a chancellor; a senatus academicus "to superintend and regulate (inter alia) the teaching and discipline of the University;" a University Court to control the decisions of the senatus academicus, and to enforce due attention on the part of the professors to regulations as to the mode of teaching and other duties imposed on them, and to fix and regulate the fees from time to time in the several classes; it has also a university council, And in order to produce uniformity in the several universities

the statute constitutes a general body of commissioners with legislative powers, for a limited period, to make statutes and ordinances, such as in their opinion would be conducive to the well-being of the universities, the advancement of learning, the course of study, and the manner of examination, &c. The statute also gives to those commissioners an important power, namely to recommend grants of public money for certain purposes, and amongst others, "for increasing the salaries presently attached to existing professorships."

The pursuer was a professor in the University of Glasgow, nominated to his chair by the Court of the University, remunerated partly by salary paid out of the university revenues, or out of moneys voted by Parliament, and partly by class fees which, however, equally formed part of the University revenue, though allocated for the time being to him. His obligation and his duty were to teach the nation through its youth, according to the regulations laid down by the governing body of the University. It does not appear what those regulations were, nor is it alleged that there were any restrictions or conditions imposed on the students of the class, or other auditors, by that governing body, as to the use to be made of the professor's lectures when delivered. I assume too, as the contrary does not appear, that the pursuer was left free to teach by lectures if he thought fit. He did teach by the instrumentality of reading lectures. The broad question for our consideration is whether that reading of his lectures to those assembled in the lecture-room is a publication to the nation.

My Lords, after much anxious consideration, I have come to the conclusion that the delivery of the lectures was a publication to the public at large, and that being such, the pursuer has abandoned to the public the exclusive rights which he otherwise had, and the protection which the common law would otherwise have afforded him. I have struggled against this conclusion, as I am conscious how superior my noble and learned friends are to me in knowledge and judgment, but I have been unable to agree with them, and am compelled, on the other hand, to accept the broad and vigorous reasoning of the Lord President and Lords Young and McLaren.

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It was urged in your Lordships' House in argument, that a decision in favour of the respondent would operate unjustly on the professor as depriving him of emoluments which he might otherwise derive from the publication and sale of his lectures, by himself or his representatives, for all time; but this seems an exaggerated, and to some extent, an imaginary apprehension. There is no power, save that of the university, to interfere with the professor in publishing his lectures for sale, and the public would probably prefer the publication issued with the stamp of his authority, and containing his emendations and additions. This is, however, a consideration which we cannot enter upon. Again, it was urged that the professional practice of repeating the same lecture session after session, in like manner as a minister repeats his sermon, would be interfered with. If this was so, it would seem to be a desirable result.

The sheriff in his note to the interlocutor of the 23rd of November, 1883, says, inter alia, on this point. "The professor's thoughts as expressed that year must be the same as those to be similarly expressed the next year." This would seem to assimilate the professor's duty to the cuckoo cry of repetition. I rather think that this eminent professor would repudiate such a suggestion, and tell us that the lecturer should remember that,

> "Beneath this starry arch
> Naught resteth or is still."

and that his duty is to watch over and criticise new modes of thought, new works, the march of intellect, and those discoveries which,

> "Make old knowledge
> Pale before the new."

Even in pure mathematics there may be alterations and additions, and ethical science is not free from the inexorable law of mutability.

Lord Young in the reasons for his judgment says: "Now, I have to observe that neither the common law of property nor the statute law of copyright applies to teaching in a public university. It is obviously expedient in the public interest that such teaching should be public, and open to public comment and

criticism. This accordingly, I apprehend, is the reason why lectures in public universities are excepted from the provisions of the Act of 1835." My Lords, I concur with the learned Lord (Lord Young), in opinion, that it is essential to the public safety that university teaching should be exposed to comment, to searching criticism and to the full blaze of public opinion. How can this be attained if the contention of the pursuer is well founded? If the lecturer can prevent all other publication of his lectures than that which takes place in his class-room, the nation may be left in Cimmerian darkness as to the teachings of its youth in its great universities. Unless there be full and complete publicity, criticism would be impracticable, and a mere empty sound.

Lord Young, in the passage just quoted, touches on another subject, namely, the Act of 1835, to which, perhaps, sufficient attention has not been given.

The Bill which became the Act of 1835 (5 & 6 Will. 4, c. 65), was introduced into this House about ten years after Lord Eldon had given his decision on the injunction motion in *Abernethy* v. *Hutchinson* (1), and it is not improbable that the difficulties supposed to exist in consequence of Lord Eldon's reasons led to the Bill. It is a Bill entitled "for preventing the publication of lectures without consent." The preamble is obviously taken from the Copyright Act, 8 Anne, c. 19, and the 1st section is large enough to apply to and embrace all lectures wheresoever delivered; s. 2 prohibits under certain penalties the publication of any lecture in any newspaper without the license of the author; and s. 3 provides that no person allowed for fee or reward or otherwise to be present at a lecture delivered in any place shall be deemed to have leave to print or copy or publish such lecture. The Bill as introduced in this House, seems to have passed without debate, but in the Commons it met with considerable opposition on the broad ground that if it was intended to shield public lectures from public inspection it ought not to receive the sanction of Parliament. In the course of the discussion attention was specially directed to *Abernethy* v. *Hutchinson* (1), which was probably misunderstood. It ended in a compromise, by which

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

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words were added at the end of clause 5, providing that the Act should not extend "to any lecture delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of, or according to any gift, endowment or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed."

In *Millar* v. *Taylor* (1) it is reported that "Mr. Murphy, counsel for the defendant, strongly contended from the amendments made in the Commons on the statute of 8 Anne, and from the change of title, that Parliament intended to take away or to declare that there was no property at the common law," but to this Willes, J., answered, that "The sense and meaning of an Act must be collected from what it says when *passed* into law, and not from the history of the changes it underwent in the House where it took its rise. The history is not known to the other House or to the Sovereign." The rule so aptly expressed has always been enforced in this House. But, strangely enough, Willes, J., does, shortly afterwards in the same judgment, seem to offend against his own rule. He uses language which I quote as not inapplicable to the statute before us. His language is this: "The preamble is infinitely stronger in the original Bill as it was brought into the House and referred to the committee. But to go into the history of the changes the Bill underwent in the House of Commons, it certainly went to the committee as a Bill to *secure the undoubted property* of copies *for ever*. It is plain that objections arose in the committee to the generality of the proposition, which ended in securing the property of copies for a *term* without prejudice to either side of the question upon the *general* proposition as to the *right*."

Now, looking at the 5 & 6 Will. 4, we may at least say that objection was taken in the Commons to the generality of the proposed measure, and the proviso was there added at the end of the 5th clause. The statute seems at once in its first clause to recognise the property of the lecturer in his lecture, and to confer on him the sole right and liberty of printing and publishing such lecture, even though he may have delivered the same under such a state of circumstances as would have otherwise

(1) 4 Burr. 2332.

amounted to an abandonment of his words and thoughts to the public. "Leave of the author," and "consent of the author" would probably be interpreted as meaning express leave or consent, such as would confer a title on the licensee, and sect. 4 seems to support that view. There is difficulty of construction in every part of this short statute, but especially in sect. 5. I am unable to read the concluding proviso of sect. 5 save as indicating a statutable declaration that lectures delivered in a university, which is necessarily a public institution, become thereby public property for the purposes of publication and public criticism. As to the concluding sentence, "that the law relating thereto shall remain the same as if this Act had not passed," the words seem to me to have no real force. The reservation is of such common law right, if any, as existed before the Act. The statute does not interfere with or abridge any common law right, but leaves it as it was. In my judgment the only common law right the university lecturer has is a right of property in his lecture when composed, and before its public delivery in the university. There seems to have been no decision whatever on the subject of lectures delivered in a public university prior to the passing of that Act. I am unable to accept *Abernethy* v. *Hutchinson* (1) as final or satisfactory on the propositions, if any, which it is supposed to decide. It arose on motion only, supported by the affidavit of the plaintiff; there never was a plenary hearing of the cause. Lord Eldon treats as a pure question of law, which he would not decide, "property in sentiments or language not deposited on paper." He then goes into implied contract, or breach of trust, which is wholly inapplicable to the case before us, and it is observable that his strictures are principally, if not wholly, directed against printing for profit. He adopts, in substance, the proposition of Aston, J., in *Millar* v. *Taylor* (2), that "he has no right to publish for profit the identical work." On the first hearing of the motion, Lord Eldon refused the injunction, but gave leave to renew it "on the ground of breach of contract or breach of trust."

The Bill having been amended, and the amendment having been supported by affidavit, the motion was renewed on the

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28. (2) 4 Burr. 2332.

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ground of "contract" only; and Lord Eldon's decision of the motion is expressed in these words: "He was clearly of opinion that whatever else might be done with it, the lecture could not be published for profit." That is the whole decision of Lord Eldon. Lord Eldon makes a passing observation (which has been alluded to already by my noble and learned friend (Lord Watson)), which requires attention. He says: "Nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that. We used to take notes at his lectures; at Sir Robert Chambers' lectures, also, the students used to take notes; but it was never understood that those lectures could be published."

These observations of Lord Eldon are rather of a negative character, and are somewhat loose, but are undoubtedly valuable as shewing that Lord Eldon had in his mind the case of the university professor. But what do they amount to? I am at this moment unaware whether Sir William Blackstone's lectures were ever published as lectures, or that any one asserted a right to do so, or was prevented from doing so. When Lord Eldon speaks of Blackstone's copyright for twenty years he is obviously referrring, not to his lectures as such, but to Blackstone's Commentaries. The commentaries, which were founded on the lectures, revised, corrected and enlarged, with notes, were first published in 1765. Nine editions were published in the lifetime of Sir William Blackstone, all revised and added to by the learned author. He prepared also a tenth edition which was not published until after his death in 1780. He had an undoubted copyright in "The Commentaries" under the statute of Anne.

Finding a statement in the debate in the House of Commons on the Bill of 1835, that the Abernethy suit had been abandoned, your Lordships made some inquiry, with the result that the injunction had been dissolved, but under what circumstances we have been unable to ascertain. I cannot think that *Abernethy* v. *Hutchinson* (1) is entitled to the great weight that has been attributed to it, and it seems to me to state no principle which ought to guide us in the present case. The public lecturer at a university has no authority of his own to impose conditions on his

(1) 3 L. J. (Ch.) 209; 1 H. & T. 28.

pupils or those entitled to attend his lectures; nor can it be truly said that he could create a trust in his own favour. It is not necessary to consider what the university might do in the exercise of its plenary powers, "for the advancement of religion and learning, and improving and regulating the course of study therein."

My Lords, in the legal view which I have adopted it is not necessary for me to consider the weighty authorities to which we have been referred, some of them rather obscured by the extreme length of the judicial reasons. My opinion is that a public lecture delivered publicly at a university by one of its professors in the performance of the public duty he has undertaken, becomes by the act of delivery published to the nation, and may be likened to a gift from the university or the professor to the nation.

In the course which the case is now about to take my opinion becomes worthless. I am bound to assume that I am wrong in point of law. Your Lordships' judgment settles the law finally, and in yielding a willing obedience I have, at least, the palliation for mistake in law that I have erred in company with the Lord President, the Lord Justice-Clerk, and four other able and eminent Scotch judges.

I have only to add that on looking at the debate in the House of Commons (1) I find it stated there by a person who had, or at least ought to have had, the most full and accurate knowledge on the subject, namely, the late Mr. Wakley, who was member for Finsbury, and was one of the editors of the *Lancet*, against which paper the *Abernethy Case* had been instituted, that the suit had been abandoned by the professor in consequence of its having been found that he held the position of a public professor.

Interlocutor of the Second Division of the Court of Session appealed from, dated the 23rd of October, 1885, reversed, with the exception of the first three findings of fact, and in respect of these findings, and also in respect that it was admitted by the parties at the bar, and that the cause was heard upon the footing that, according to the opinions of

(1) Hansard, vol. xxx, 3rd Series, 953; see also *The Times*, Aug. 26, 1835.

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the majority of the consulted judges, the works complained of are in substance a reproduction of the appellant's lectures: It is declared that the delivery of the said lectures by the appellant to his students, as part of his ordinary course, was not equivalent to publication thereof, and that the appellant is entitled notwithstanding such delivery to restrain all other persons from publishing the said lectures without his consent, and, subject to this declaration, that the cause be remitted to the Second Division of the Court of Session with directions to affirm the interlocutor of the Sheriff-Substitute dated the 15th of February, 1884, and to find the appellant entitled to the expenses of process incurred by him in the Court of Session. And it is further Ordered that the respondent do pay to the appellant his costs of the appeal to this House.

Lords' Journals, 13th June, 1887.

Agent for appellant: *W. A. Loch, for H. & R. Lamond, Writers, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *Peace & Co., for George M'Nee, Writer, Glasgow.*

[HOUSE OF LORDS.]

H. L. (D.)
1886
May 17.

GIFFORD'S DIVORCE BILL

Divorce Bill—Practice—Service of Notice of Second Reading — Substituted Service.

In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on the respondent on the ground that his address was unknown to the petitioner, that a solicitor who had previously acted for the respondent had admitted that he knew of his address but had refused to divulge it and that the respondent had been last heard of in February, 1886, being then at Montreal, in Canada :—

Held, that the application was premature, and must be refused.

THIS was a bill to dissolve the marriage of Mrs. Harriett Frances Gifford with James Richard Gifford, on the ground of his cruelty and adultery. The marriage took place on the 11th of November, 1875, and there had been no issue.

On the 30th of March, 1886, the President of the Probate and Matrimonial Division of the Supreme Court of Judicature, Ireland, after a trial before a special jury, pronounced a decree of divorce à mensâ et thoro.

G. S. Bower, for the promoter of the bill, asked the House to dispense with personal service upon the respondent. He stated that the solicitor, who was present to watch the proceedings in Dublin, had admitted that he knew the address of the respondent; but had refused to divulge it. The respondent did not personally appear at the trial in Dublin, and had been last heard of in February, 1886, as being in Montreal. [LORD BLACKBURN :—It is rather hasty to assume you cannot find him.] Substituted service, in nearly the same circumstances, was allowed in the *Cashel Divorce Bill*, 20th February, 1866 (1).

[LORD FITZGERALD :—There, there was this difference,—the father admitted that he was in constant communication with his daughter, the respondent, and that there would be no difficulty in his transmitting the notice, &c. to her. LORD WATSON :—Enough has not been done to excuse further endeavours to

(1) 98 H. L. J. 49, 50.

H. L. (D.) 1887 GIFFORD'S DIVORCE BILL.

comply with the order for personal service. Application for the respondent's address might be made to the solicitor who acted for the respondent in Ireland, or to any other person whom the petitioner thinks capable of giving the information; with an intimation to such person of the purpose for which the address is required. If they refuse, and the petitioner has no other means of ascertaining the address, she may apply again.]

THE HOUSE (Lord Herschell, L.C., and Lords Blackburn, Watson, FitzGerald, Halsbury, and Ashbourne) refused the application, with leave to renew it.

1887. Feb. 25. *Bower*, renewed his application that substituted service might be made on the brother of the respondent, citing the *Cashell Case*, 1866 (1), *Arabin Case*, 1789 (2), and *Earl Rosebery Case*, 1815 (3). The solicitor for the respondent refused to give the address: but the brother of the respondent had promised to forward a communication.

THE HOUSE (Lord Halsbury, L.C., Earl of Selborne, and Lord Macnaghten), made the order for substituted service upon the brother.

SECOND READING.

Cruelty—Adultery.

Acts which would if done in England be held by the High Court of Justice to constitute legal cruelty, will also be held to constitute legal cruelty in Divorce Bills.

1887. March 22. *Bower*, for the promoter of the bill, having proved substituted service upon the brother of the respondent, proceeded to call evidence in support of the allegations contained in the bill.

The respondent was not represented.

The petitioner examined stated, inter alia, that in 1879 she was very ill, and her medical attendant advised her to sleep separate from her husband. She informed her husband of the doctor's advice. Her illness caused her great pain, especially when

(1) 98 H. L. J. 49, 50. (2) 38 H. L. J. 443.
(3) 50 H. L. J. 175.

excited. The respondent in 1885 became a confirmed drunkard, and one night in that year he came into her bedroom, and having knocked all the furniture about, he threw himself right across her in bed. He was a very big man, nearly seventeen stone, and she was very frail and slight. She fainted. This happened more than once. In March, 1883, the respondent came home at two o'clock in the morning, and as the maid took off his boots, he flung them at the petitioner, and then he threw at her a china candlestick, which struck the shutter near her and was smashed. She was greatly terrified. The doctor ordered her nourishing food, and the respondent neglected to supply it; also he drank the only brandy which was in the house for her use. Through these acts of cruelty her health was utterly broken down. His debts were frequently paid by her family, and because she refused in February, 1885, to ask her relations for more money, he told her to leave his house. She then left his house, and he had not since supported her in any way.

Mrs. Gifford's sister, who lived with her, gave similar evidence. A physician, who attended Mrs. Gifford, proved that she was in 1883 and 1885 suffering from inflammation of the ovaries. The consequence of this illness was great pain, want of sleep, loss of appetite, nausea, and vomiting. He advised her to avoid any cohabitation. It was most important for her to have nourishing food. Her disorder produced great mental depression and nervousness. Irritation or excitement of any kind tended to increase the effects of the illness—a very slight annoyance would bring on vomiting and fainting.

Witnesses were also examined as to acts of adultery.

LORD HERSCHELL:—

My Lords, in this case, the evidence which has been adduced clearly establishes acts of adultery on the part of the husband. And, I think, the evidence also proves such acts of cruelty as would be sufficient in England to warrant a divorce between the parties. Your Lordships' House has already laid down (1), that wherever that is established it affords sufficient foundation for a

(1) *Westropp's Divorce Bill*, 11 App. Cas. 294.

H. L. (D.) 1887 GIFFORD'S DIVORCE BILL.

bill such as the present. I have, therefore, to move that the preamble of the bill has been proved.

LORDS WATSON, FITZGERALD, and MACNAGHTEN, concurred.

The bill was then read a second time, and ultimately on the 23rd of May, 1887, became law.

Agents: *Clay & Close, for Casey & Clay, Solicitors, Dublin.*

[HOUSE OF LORDS.]

H. L. (D.) 1887 *May* 2.

A.'s DIVORCE BILL.

Divorce Bill—Second Reading—Substituted Service.

Where on a bill for a divorce it appeared that the respondent's address was concealed, and the House ordered substituted service, service was ordered to be made on the respondent's solicitor, on the respondent's parent, and also on the person with whom the respondent appeared to be residing.

BILL to dissolve the marriage between R. A., doctor of medicine in Ireland, and M. E. A., on the ground of M. E. A.'s adultery.

The marriage was celebrated on the 25th of October, 1884. The parties lived in the same house until February, 1885. On the 31st of August, 1886, M. E. A was delivered of a child, of which A. was not the father. On the 1st of March, 1887, A. obtained a final decree of divorce à mensâ et thoro in the Probate and Matrimonial Division of the High Court of Judicature in Ireland. He had previously on the 15th of October, 1886, obtained interlocutory judgment against W. C. P. for default in not appearing to a summons taken out by A. for damages for criminal conversation with M. E. A. On the 23rd of February, 1887, the damages were assessed by a judge at £500, but the sheriff's return was £2 8*s.* 6*d.*

This was an application by the petitioner that substituted service might be made upon a Mrs. B. at Aldershot, or on Messrs. Hayes & Sons at Dublin, solicitors to the respondent.

H. L. (D.) 1887 A.'s Divorce Bill.

Greig, for the petitioner, stated they had made diligent endeavours to serve the respondent with notice of the second reading, but had hitherto failed to find her.

The petitioner's solicitor had found at Aldershot a nurse who had attended the respondent, and she said she had promised not to betray the respondent's address, but she said to him that the respondent was not far off, that she would forward a copy of the bill to her, and that she would be in attendance at the second reading. The nurse also directed the solicitor's attention to a child about a year old, and said "that is the respondent's child." The divorce proceedings were defended in Ireland.

The House (Lords Watson, FitzGerald, and Macnaghten) Ordered that service of copies of the bill and of the order for the second reading upon the nurse at Aldershot, and Messrs. Hayes & Sons, the solicitors to Mrs. A. in the Probate and Matrimonial Division of the High Court of Justice in Ireland, and the despatch by post of copies of the said bill and order by registered letter to the respondent's mother (her father being dead), be deemed as good service of the said bill and order as if the same had been personally served upon the respondent.

Allowance to Wife.

1887 *May* 13.

Where upon a bill for divorce by the husband it appears that the wife has no means to defend herself, the House will order the husband to pay her a small sum in order that she may make her defence.

Frere, agent for the respondent, Mrs. A., stated that she was absolutely without means to make her defence. A sum of £400 was settled upon her on her marriage, but she never had it, nor had it ever been under her control. [Lord Watson:—We must know what kind of defence is about to be set up.] The respondent alleges no marriage, because of impotence of the husband, on that ground only does she impeach the judgment of the Irish Court. Her defence will require £100.

Greig, for the petitioner. The petitioner does not desire to oppose this application in any harsh or vexatious spirit, but £30

H. L. (D.) 1887 A.'s Divorce Bill.

or £50 would seem to be quite sufficient; and those are the amounts of the sums usually given in these cases: *Sir John Dillon's Case* (1701), where the husband said he was willing to pay reasonable fees to defend his wife (1); *Jermyn's bill* (1706), ten guineas allowed to the wife (2); *Francis Loggin's bill* (1714), also ten guineas were ordered to be paid the wife (3); *J. H. Llewelyn's bill* (1851), wife to be paid £30 (4); *Alexander Campbell's bill* (1857), wife to be paid £50 (5).

The House (Lord Halsbury, L.C., and Lords Watson, Bramwell, FitzGerald, Herschell, and Macnaghten), ordered that R. A. do forthwith pay to the said Mrs. M. E. A. the sum of £30 to enable her to make her defence against the said bill.

1887 May 16.

SECOND READING.

Divorce—Adultery—Alleged Nullity—Impotence—Provision for Wife.

Where, on a bill of divorce by the husband on the ground of the wife's adultery the adultery was proved, but it appeared that the husband had not fulfilled his duty by providing a home for the wife when she was separated from him by order of his medical attendant, the House in passing the bill directed that a clause should be added making provision for the wife.

Bill for divorce by husband against wife.

MacLaughlin, Q.C., and *Colthurst* (both of the Irish Bar), for the petitioner, opened the allegations in support of the bill. The promoter is a doctor of medicine, and medical superintendent of a lunatic asylum in Ireland. His salary was £400. The respondent brought him no fortune, though she was entitled under her father's will to £400, and on his death his personalty was sworn under £6000. The marriage took place on the 25th of October, 1884, but the parties only lived together until the following February, in fact they only slept together in all for thirty-five nights. The respondent admitted she had given birth to a child of which the petitioner could not by any possibility

(1) 16 H. L. J. 647.
(2) 18 H. L. J. 204.
(3) 19 H. L. J. 675.
(4) 83 H. L. J. 373.
(5) 89 H. L. J. 57.

have been the father. The father of that child she said was her brother-in-law. The brother-in-law did not acknowledge the child as his, but had admitted guilty intercourse between him and the respondent. The respondent, although she does not deny the allegations in the bill, traverses the charge of adultery, alleging there was no marriage, as there had been no consummation. At the trial in Ireland the medical inspectors appointed, reported that there was no impotency, and the Court held there had been adultery, and although the respondent appealed she did not appeal on the question of the merits, but only as to the question of costs, and those the Court gave her.

The petitioner was then examined. His evidence was substantially as follows. At the time of the marriage he was thirty-two and his wife twenty-eight, both being single persons. The marriage had never been consummated. On the night of marriage he was seized with a nervous attack, and he was unable to consummate. He made no further attempt after the first night. He was not aware of any incapacity, and had never been subject to nervous attacks before that night. He attributed the illness to a great mental shock he received on discovering that his wife was suffering from a tumour in the womb. His nervous attack was accompanied with excitement and prostration coupled with mental depression. His doctor ordered him to live separate from his wife. He went to America in July, 1885, and returned in October, 1885. He arranged that his wife should be paid monthly, a hundred a year. This was paid her until June, 1886.

A. W. Samuels, of the Irish bar, for the respondent:—

The respondent does not wish to raise any question of nullity; but this is a case where some allowance ought to be made to the wife, she having no means of support whatever, and the opposition is to gain that end (1). The evidence shews that the separation was not voluntary on her part, and that her conduct until her fall was irreproachable.

The petitioner in cross-examination admitted that his wife sat up night after night with him, read to him, and did not want to

(1) See *Simmon's Divorce Bill*, 12 Cl. & F. 341.

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leave him. He did say to her: "Mary, I have ruined your life." And possibly, that "she never would have children"; and that "he ought never to have married." His wife's presence irritated him, and she was ordered not to live in the same house. One of the medical men whom he consulted immediately after the marriage as to his illness was his own brother. His wife was ordered not to call any further at the house where he was by his authority and by the order of a medical man. In February, 1885, she followed him to Woolwich and was very violent. No doubt she was protesting all the time that she should be allowed to remain with him, but she also wanted to keep him away from his friends. She was told not to write to him. Eventually his residence was concealed from her. In September, 1885, his wife went to live with her sister, and on the 31st of August, 1886, was delivered of a child.

To Lord Halsbury, L.C.:—He consulted several doctors, and they all advised him to leave his wife.

[Lord Halsbury, L.C.:—The conduct of the husband towards the lady after the fact of non-consummation, may have a very strong bearing upon the question whether the wife ought now to have a provision. Lord Watson:—Assuming everything against the wife, it is important to know how the separation was brought about, and what provision the husband made for her.]

To Lord Watson:—He did not personally assign any place of residence for his wife. And before he left for America he made no reference to her residence, but he had heard that it was arranged by his and her friends that she should reside with her sister in Manchester. He had to leave his work during the time he was ill, but by the 2nd of October, 1885, he was restored to health, and returned to his work. But he was advised not to live with his wife for two years.

Certain letters were then read:—

The husband writing from London to his father, 25th of May, 1885, said it was with great difficulty he wrote on the subject of his poor wife returning to live with him. He hoped shortly to return to his work, but he was perfectly sure, and the best physicians told him also, that he should not be able to bear

Mary with him for at least eighteen months. Perhaps she might be able to go to Canada, as she had previously intended, for a year or so, in order that the time might pass quicker.

Again writing on the 5th of July, 1885, from Cork, to his wife, he said, at length he must write to her himself to lay before her the facts and his feelings regarding their unhappy marriage. The unfortunate circumstances which had occurred since then had so altered his affections, that whatever might be the outcome he knew he could never live with her as his wife. She doubtless had suffered deeply and must suffer, and it went to his heart to think that the injudicious advice and action of friends should have made two lives miserable. All that he could hope to do now was to return to his work, and if he could perform it, to allow her a separate maintenance. If her friends would not advise her to accede to this, then all that was left to him was to live on at Cork, on the bounty of his relations, when, of course, he would be unable to make her any allowance.

Two days after, he again writes to his wife: That never for a moment, except for the few hours of disturbed sleep, was he free from the mental torture that he should have married and yet be unable to live with his wife. She was not to think it was his father, mother, or friends, who wished that they should be parted. He felt it would be disastrous for him to attempt to have her with him; and that some arrangement should be mutually agreed to, and that he could not make the attempt to resume his work until he was assured that she would consent to such an arrangement.

On the 14th of May, 1886, Mr. D., a friend of the petitioner, and a late member of his firm of solicitors, wrote to a brother of the wife's, to the effect that the medical advisers of the husband had strictly forbidden him ever to live with his wife again. That he thought it a case for separation, and that the husband should pay £500 in cash, and £120 a year so long as he earned £200 a year and upwards.

On the 10th of June, 1886, he wrote to Mr. D., that he desired to say emphatically that any attempt to again live with his wife would be attended with disastrous consequences and could not be entertained. Under the circumstances a permanent

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separation offered the only chance of a means of living, and he felt that the sooner this could be definitely arranged the better.

Lord Halsbury, L.C.:—

The House is of opinion some allowance should be made by the husband for the wife. The petitioner may prove his case as far as he can, without touching the matter of allowance; and then the House will probably be able to adjourn for half an hour, and within that time, the parties may be able to come to some arrangement.

The fact that the respondent had given birth to a child was then formally proved.

Lord Halsbury, L.C.:—

The view which their Lordships entertain is that adultery is proved, and the petitioner's right to the second reading of the bill is established, subject to this, that their Lordships think that under the circumstances some allowance should be made, but their Lordships desire to leave it to the parties to settle the matter between themselves if they possibly can, so that the House should not have to intervene. But in the event of the parties not agreeing, their Lordships will themselves have to decide it.

Counsel for the petitioner and respondent having consulted, the petitioner agreed to pay the wife a lump sum of £700, on the third reading of the bill, and that a clause to that effect should be added to the bill.

The House (Lord Halsbury, L.C., and Lords Watson, Fitz-Gerald, and Macnaghten; there being also present the Bishop of Gloucester and Bristol) passed the preamble of the bill.

The bill was subsequently amended in Committee and ultimately received the royal assent on the 12th of July, 1887.

Agents for husband: *Holmes, Greig & Greig, for Dobbyn, Tandy & McCoy, Solicitors, Dublin.*

Agents for wife: *Rees & Frere, for Hayes & Sons, Solicitors, Dublin.*

[HOUSE OF LORDS.]

JOSEPH WRIGHT AND GRACE ELIZABETH WRIGHT, HIS WIFE . . . . } APPELLANTS;

AND

HORTON AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1887 June 13.

Company—Registration of Mortgages—Directors—Mortgage to Director not registered—Companies Act 1862 (25 & 26 *Vict. c.* 89) *s.* 43.

Debentures in a company incorporated under the Companies Act 1862 were issued to a director of the company. They were not registered in accordance with the requirements of sect. 43 of the Act. The company having gone into liquidation and the validity of these debentures being contested by unsecured creditors, and also by debenture-holders, as to whom it was not shewn that they had made any inquiry as to the charges on the company's property or the existence of a register:—

Held, reversing the decision of the Court of Appeal, that the mere omission to register, without concealment, did not invalidate the debentures; at all events as between the director and such creditors.

The rule of construction laid down by *In re Native Iron Ore Company* (2 Ch. D. 345) and the decisions prior to it disapproved.

The reasoning of Jessel M.R. in *In re Globe New Patent Iron and Steel Company* (48 L. J. (Ch.) 295) approved.

JOSEPH WRIGHT & CO. Limited were incorporated as a company in 1875 under the Companies Act 1862. By the articles of association the directors had power to raise money upon debentures. In 1878 two debentures for £500 each were issued to the appellant Joseph Wright, who was at that time and at the time of the liquidation a director of the company. These debentures were entered in a book kept by the company containing a list of its debentures, but they were not registered in accordance with the requirements of sect. 43 of the Companies Act 1862. In July 1881 Joseph Wright executed a deed declaring that he held these debentures in trust for his wife, the other appellant, and notice of this deed was at the same time given to the company. In August 1881 the company went into liquidation, and the assets were insufficient to satisfy all the debenture-holders.

Summonses having been taken out before Chitty J. by the

H. L. (E.) 1887 WRIGHT v. HORTON.

liquidator with respect to the payment of dividends, the validity of the appellants' debentures was contested both by the unsecured creditors and by certain debenture-holders. Among the latter class were the respondents Keily and Stowell, executors of Stevens a debenture-holder.

Chitty J., following the case of *In re Native Iron Ore Compony* (1) and the decisions prior to it, and being of opinion that the declaration of trust made no difference, held that the appellants' debentures were invalid so far as they purported to charge the undertaking and property of the company, and made orders accordingly. These orders were affirmed by two orders of the Court of Appeal, following the same authorities.

From these decisions the present appeal was brought.

1886. Nov. 25, 26. *Macnaghten* Q.C. and *Phipson Beale* for the appellants:—

The question is whether certain decisions are right in their construction of the Companies Act 1862 (25 & 26 Vict. c. 89) sect. 43, in holding that in addition to the penalty there imposed on every director, manager, or officer of the company, who knowingly or wilfully authorizes or permits the omission to register a debenture, any director &c. who holds a debenture and merely omits to register it, forfeits the debenture, or at least is prevented from setting it up against the creditors of the company in a winding-up. The present case is not distinguishable in principle from the earliest decisions which laid down that rule of construction. They are *In re Wynn Hall Coal Company* per Malins V.C. (2); *Ex parte Valpy & Chaplin* per Lord Romilly M.R. and James L.J. (3); *In re Native Iron Ore Company* per Mellish and Baggallay L.JJ. (4). These cases were all disapproved of by Jessel M.R. before whom the question arose in four cases, viz: *In re Borough of Hackney Newspaper Company* (5); *In re International Pulp and Paper Company* (6); *In re South Durham Iron Company* (where Bramwell L.J. agreed with Jessel M.R.) (7);

(1) 2 Ch. D. 345.
(2) Law Rep. 10 Eq. 515.
(3) Law Rep. 7 Ch. 289.
(4) 2 Ch. D. 345.
(5) 3 Ch. D. 669.
(6) 6 Ch. D. 556.
(7) 11 Ch. D. 579.

and *In re Globe New Patent Iron and Steel Company* (1). The judgment of Jessel M.R. in the latter case contains the most forcible reasons for holding such a construction to be wrong. The present case is on all fours with *In re Native Iron Ore Company* (2); no register being kept, but there being no fraud or concealment, nothing more than a mere omission. To create such a forfeiture as that contended for the director must raise an equity against himself, between himself and creditors or the outside public, as by concealing the debentures. In the present case there was no concealment, as shewn by the existence of the debenture book. The mere omission to register is not the same thing as "knowingly and wilfully authorizing or permitting the omission" of the entry. If the respondents' construction of sect. 43 is correct why is it not applied to all the other sections which impose penalties for various offences? See also *In re Great Western Forest of Dean Coal Consumers Company* (3), as to the status of solicitor to a company; *In re Underbank Mills, &c. Company* (4) as to registration.

Ince Q.C. and *J. G. Laing*, for the respondents Keily and Stowell, executors of Stevens (5):—

The statute throws upon the director or officer of the company the duty to make known to everybody concerned, e.g. the shareholders and creditors, the state of the company's obligations. This places him in a quasi-fiduciary position to keep up the register. The doctrine of equity steps in and says no man shall take advantage of his own wrong: no one knowing his own title, and placed in a position where he ought to disclose it and not disclosing it can afterwards set it up. This is so well known a doctrine that James L.J. in the decisions already cited did not think it necessary to refer to authorities. "Silence" of a director or officer in such a position amounts to "a disclaimer of interest;" as Lord Chancellor Sugden said in *Boyd* v. *Belton* (6), approving *Govett* v. *Richmond* (7). Disregarding this well-established

(1) 27 W. R. 424; 48 L. J. (Ch.) 295.
(2) 2 Ch. D. 345.
(3) 31 Ch. D. 496.
(4) 31 Ch. D. 226.
(5) The other respondents were not represented by counsel.
(6) 1 J. & Lat. 730, 751.
(7) 7 Sim. 1.

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doctrine Jessel M.R. would persist in trying to find something in the statute expressly enunciating the doctrine. There is nothing in the statute beyond casting on the officer the duty above named: and there need be nothing more: it is not necessary to prove contrivance, misrepresentation or conduct: the mere not doing the duty enacted is enough: it is immaterial to shew that the person affected was in fact deceived. The contrary decision would let in a conflict of testimony in every case. At the least the onus is on the appellants to shew that Stevens was not deceived. For the above doctrine it is enough to refer to *Savage* v. *Foster* (1) (where it was held that infancy and coverture were no excuse) and a series of decisions cited in the notes to that case in 2 Wh. & Tu. L. C. Eq. 5th ed. 620, 624. See also the observations of Lord Cairns in *Shropshire Union Railways and Canal Company* v. *Reg.* (2). *Ex parte Harper* (3) shews that equity does sometimes add to the duties imposed by statute. The earlier decisions on sect. 43 of the Companies Act 1862 are therefore based on a sound principle. The observations of Jessel M.R. in *In re Globe New Patent Iron and Steel Company* (4) were mere dicta not necessary to the decision.

Macnaghten Q.C. in reply:—

The doctrine laid down by the respondents' counsel as to standing by and not disclosing a title, is subject to this qualification, that the party affected has been induced by the non-disclosure to alter his position. No such case is made out here. It is not shewn that Stevens was or could have been deceived: or that he made any inquiries or knew whether there was or was not a register, or whether there were any mortgages at all.

The House took time for consideration.

1887. June 13. LORD HALSBURY L.C.:—

My Lords, I believe the only question which your Lordships have to determine upon this appeal is the true construction of the 43rd section of 25 & 26 Vict. c. 89. I do not think that any

(1) 9 Mod. 35.
(2) Law Rep. 7 H. L. 496, 506.
(3) 20 Ch. D. 685.
(4) 48 L. J. (Ch.) 296, 297.

materials are before us upon which we could properly pronounce an opinion upon the question of fact referred to at your Lordships' bar.

If a director who has a fiduciary duty towards his shareholders, omits that duty and thereby gains an advantage for himself, it is clear he cannot retain it; and even without the fiduciary relation if one man induces another to advance money upon a property which is alleged to be unincumbered, and which the borrower (either a borrower for himself or for a company of which he is director or agent), knows to be incumbered, such a transaction cannot stand if the borrower either himself makes or knowingly permits others to make such a representation. Whether any facts are susceptible of proof which could call upon your Lordships to decide upon the validity of Mr. Joseph Wright's debentures upon any such grounds as I have glanced at, I do not know, and I desire expressly to guard myself against expressing any opinion upon the subject. Neither Chitty J. nor the Court of Appeal have determined or professed to determine the question upon any such ground, but solely upon the ground that Mr. Joseph Wright's debentures were not registered, and that he was a director and manager of the company. It is therefore apparent that the true construction of the section I have quoted must determine the question in debate. The language of that section is as follows:—

"Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding £50: The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every

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director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding £5, and a further penalty not exceeding £2 for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register."

The first observation that arises upon the section is, that the validity of the mortgage or charge is not, in express terms at all events, made to depend upon its registration; nor do I understand that any Court has ever decided that that is its effect; and if it is once granted that a charge may be effectual, notwithstanding its non-registration, it is difficult to see how the exhibition of the register can be a representation that the mortgages registered are the only ones in existence. The second observation is, that the register of mortgages required by the Act can only be inspected by a creditor or a member of the company; and in considering the decisions which your Lordships are called upon to review, it is most important to bear these two propositions in mind. Eight years after the passing of the Act, Malins V.C. appears to have put a construction upon the section which certainly was founded upon a misapprehension of its terms; he appears to have thought that a person hesitating whether he should deal with the company or not was intended by the legislature to have the opportunity of consulting the register to guide his judgment as to whether he should trust the company or not; but, as I have already pointed out, it is only persons who are already members, or already creditors, who have a right to see the register at all. The error is important, because Malins V.C. treats this as the key to the meaning of the section, which it is clear it is not, though, of course, a creditor already a creditor might be misled if he were advancing further money upon the property of the company, and the register were made a condition to the validity of a debenture. Notwithstanding the high authority of James, Mellish, and Baggallay L.JJ. it is impossible to acquiesce in the bald statement that there is a "rule" or an "equitable principle" that an unregistered mortgage or deben-

ture is invalid as against a director, without some further exposition of what the "rule" or the "principle" is by which it is rendered invalid. The statute, for very obvious reasons, in constituting a code for the regulation of trading companies, has enacted that they shall keep an account of mortgages or charges specifically affecting their property. Had the legislature thought right it might have rendered all mortgages or charges invalid unless they had been entered in this account; it has not done so. It might further have enacted that no director or officer of the company should take any benefit from any charge or mortgage whereof he was the owner if he were a party to its non-registration; this it has not done. It has simply enacted a pecuniary penalty for the non-performance of the statutory duty when that statutory duty is knowingly and wilfully omitted.

If the principle is supposed to be that no director can be allowed to derive any benefit from a debenture which he has obtained by lending money to the company of which he is a director, because he has disobeyed or permitted to be disobeyed the provisions of the Companies Act in some respect or another, the proposition is so wide as to become on the face of it absurd. If, on the other hand, it amounts to this, that the non-registration of his debenture by a director is a continuous representation to every other shareholder and creditor that such a debenture does not exist, it assumes a construction of the section to which I cannot assent; and I know of no authority which this or any other Court has to add additional penalties to that which the legislature has specifically enacted.

For these reasons I am of opinion that the order appealed from should be reversed, with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, Joseph Wright & Co., Limited, was, in 1875, incorporated under the Companies Act 1862, and in August 1881 went into liquidation. By its articles of association the directors had power to raise money upon debentures, and on the 22nd of October 1878 two debentures for £500 each were issued to the appellant, Joseph Wright. On the 18th of July 1881 Mr. Wright

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executed a voluntary deed, which was duly intimated to the company, declaring that he held these documents of debt in trust for his wife, the other appellant; but notwithstanding that circumstance Mr. Wright must, for the purposes of the present case, be regarded as the holder of the debentures.

In 1878 when the debentures were issued, and also at the time of the liquidation, Mr. Wright was one of the directors of the company. A book was kept by the company which contained a list of its debentures; but it is conceded that the entries in that book do not fully comply with the requirements of sect. 43 of the Companies Act 1862, and that the appellants' debentures are not registered within the meaning of the clause. In these circumstances Chitty J. and the Court of Appeal have found, first, in a question between the appellants and the unsecured creditors of the company, and secondly, in a question between them and a debenture-holder, who was not a director or official of the company, that the appellants' debentures are invalid in so far as they purport to charge the undertaking and property of the company.

The principle affirmed by the judgments appealed from appears to be this, that a director or other official who lends to his company on the security of its property, and then fails to make an entry of the charge in terms of sect. 43, not only incurs the statutory penalty enacted by that section, but in addition loses the benefit of his mortgage. There has been no expression of judicial opinion in this case with respect to the soundness or unsoundness of the principle, it having been conceded, on all hands, that the Courts below were bound by two previous decisions of the Court of Appeal.

The rule in question was first laid down by Vice-Chancellor Malins in *In re Wynn Hall Coal Company* (1), and was thus explained by that learned judge: "In this case the mortgagees are the directors, who have committed an illegal act by not registering the mortgage, and, upon the strict construction of the language of the Act, I think they are precluded from setting up the mortgage. But independently of the language of the Act, I am of opinion that, upon general principles, it cannot be permitted

(1) Law Rep. 10 Eq. 515.

that directors who get a charge on the property of the company and omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors." A decision of Lord Romilly M.R. to the same effect, in *Ex parte Valpy & Chaplin* (1), was upheld by James L.J. sitting alone: "Every one," the Lord Justice said, "standing in a fiduciary position to the company is bound to see that the company obeys the directions of the legislature; and I am of opinion that the failure of the appellant to do so is fatal to his case." Next followed *In re Native Iron Ore Company* (2), in which a similar decision of the Vice-Warden of the Stannaries was affirmed by the Court of Appeal, consisting of James, Mellish and Baggallay L.JJ., all of whom were of the opinion expressed by Mellish L.J. that the rule established by the two preceding cases was "founded on a perfectly good equitable principle."

These are the decisions upon which the rule at present rests. In several subsequent cases the late Master of the Rolls (Sir George Jessel) expressed very strong disapproval of it. He did so in *In re Borough of Hackney Newspaper Company* (3), and also in *In re International Pulp and Paper Company* (4). In the first of these cases he held that directors who had realised their security before the commencement of the winding-up could not be compelled to refund the proceeds, inasmuch as they had not "knowingly and wilfully authorized or permitted the omission" to enter their mortgage on the register; and in the second, he decided that the sub-mortgagee of a director was not affected by the want of registration. In *In re South Durham Iron Company* (5) Vice-Chancellor Hall decided that the rule in *In re Native Iron Ore Company* (2) did not apply to a mortgage made to partners, of whom one only was a director of the company; and his decision was affirmed in the Court of Appeal by the Master of the Rolls and Lord Bramwell (then L.J.), dissentiente Baggallay L.J. Bramwell L.J., whilst recognising the authority of *Ex parte Valpy & Chaplin* (6), and *In re Native Iron Ore Company* (2), as binding on the Court of Appeal, did not conceal his

(1) Law Rep. 7 Ch. 289.
(2) 2 Ch. D. 345.
(3) 3 Ch. D. 669.
(4) 6 Ch. D. 556.
(5) 11 Ch. D. 579.
(6) Law Rep. 7 Ch. 289.

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disapproval of the principle laid down in these cases. In *In re Globe New Patent Iron and Steel Company* (1) the late Master of the Rolls again took the opportunity of reviewing the previous decisions, and of delivering an elaborate argument against the rule which they established.

I do not think any one of the learned judges who have supported the rule adopts the first reason assigned by Malins V.C. in *In re Wynn Hall Coal Company* (2). I do not think it can be reasonably affirmed that the rule has been enacted, either expresly or impliedly, by the legislature in sect. 43 of the Companies Act 1862, or that it could be sustained in equity apart from the provisions of that section. The clause provides that all mortgages and charges specifically affecting the property of the company, whether held by its directors or shareholders, or third parties, shall be entered in a register to be kept for that purpose by the company; and that "every director, manager, or other officer of the company, who knowingly and wilfully authorizes or permits the omission of such entry, shall incur a penalty not exceeding £50." That is the sole penalty which the statute imposes upon the failure of these persons to perform their statutory duty. If sect. 43 had been left out of the Act there would, in my opinion, have been no reasonable ground for holding that a director who had lent his money on a mortgage authorized by the memorandum and articles of association, could not exercise his rights as mortgagee in a question with other creditors of the company. As I understand the decisions of the Court of Appeal, the foundation of the rule is the neglect of the director or other official to discharge his statutory duty, which raises, or is supposed to raise, in equity, a personal disability which precludes him from enforcing his charge upon the property of the company, in competition with any creditor who is not in the same position with himself.

I have come to the conclusion that the effect of the rule is to inflict upon persons who may fail to perform the duty imposed upon them by sect. 43, severe penal consequences which the legislature has not enacted and cannot be held to have contemplated. The creation of such penalties, in addition to the pecuniary mulct which the legislature has thought fit to attach to the wilful

(1) 48 L. J. (Ch.) 295. (2) Law Rep. 10 Eq. 515.

neglect of the statutory duty of registration, is, in my opinion, altogether beyond the functions of a Court of Equity. I do not think it necessary to explain in detail the reasons which have led me to that conclusion. They are all to be found in the judgment delivered by the late Master of the Rolls in *In re Globe New Patent Iron and Steel Company* (1), in which I entirely concur, subject to the observation that it appears to me to be, in some passages, expressed in terms more forcible than the occasion required.

Whether a creditor who, after careful inquiry into the indebtedness of the company, has been induced to give it credit by the concealment, through non-registration, of mortgage or debenture debts held by directors or other officials, may be entitled to plead their personal disability in competition with himself, is a matter in regard to which I express no opinion. No such question occurs here. By the orders appealed from, a charge upon the assets of the company, which was validly constituted by the appellants' debentures, is made void, through a subsequent failure to register, as against persons who, so far as appears, became and continued to be creditors of the company without making any inquiry as to the charges on its property, or as to the existence of a statutory register.

I accordingly concur in the judgment which has been moved.

LORD FITZGERALD:—

My Lords, the debenture book of the company on the counterfoils of which was kept a full list of the debentures issued by the company, and which probably contained adequate information for all reasonable purposes, was nevertheless not a register of mortgages, as it did not comply with all the requisites of the 43rd section of the Act of 1862; but it is not alleged that in this neglect to comply with the provisions of the section there was any fraudulent omission on the part of the company or its office bearers, or that there was any concealment, or any intention to deceive or mislead, or that any debenture-holder or creditor was deceived or misled or injured thereby.

In one of the affidavits filed on behalf of the appellants Mr. Joseph Wright states that "the debenture book from which

(1) 48 L. J. (Ch.) 295.

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all debentures of the company were issued was supplied for the use of the said company as being a proper debenture book, and was always regarded by us as constituting a true and sufficient register of debentures, and we were unaware that any other book was essential for such purpose. The said debenture book contained 200 lithographed forms of debentures. Each of these forms was attached to a counterfoil and contained a description of the property mortgaged or charged, the amount of and the nature of the charge created, and the name of the mortgagee or person entitled to such charge. The printed paper now produced and shewn to us marked 'A' is one of the said counterfoils with form of debenture attached." It would seem too that the debenture holders and creditors had within their reach means of information as full for all reasonable purposes as if a proper register existed. I allude to these matters to clear the front, and reduce the question to one of law, on the construction of the 43rd section.

The appellant Wright being a director of the company, Chitty J. held that his debentures were for want of due registry invalid as against creditors, so far as they charged the property of the company. We now proceed on the admission that the appellant's debentures were not duly registered, and that he was all the time a director of the company.

Chitty J. in his decision properly yielded to prior authority binding on him. The hearing in the Court of Appeal was formal only, to enable the parties to come to this House for a final decision. The respondents have the considerable advantage of a series of decisions in their favour, commencing with *In re Wynn Hall Coal Company* (1); but on the other hand a great judge, Sir George Jessel, whenever the opportunity fairly presented itself, never failed to express his dissent, and we can easily read in the judgment of Bramwell L.J. in *In re South Durham Iron Company* (2), that he too was dissatisfied. In that case at p. 595 Baggallay L.J. says: "They" (that is Sir George Jessel and Bramwell L.J.) "are both of opinion that the decisions in *Ex parte Valpy & Chaplin* (3) and *In re Native Iron Ore Company* (4) should have been different." Although sect. 43 imposes a mandatory obligation on the company to keep a register, and to enter in it certain

(1) Law Rep. 10 Eq. 515.
(2) 11 Ch. D. 579.
(3) Law Rep. 7 Ch. 289.
(4) 2 Ch. D. 345.

particulars of each charge, it does not declare that the absence of registry, or a defective registry, shall either avoid the charge or in any respect invalidate it. There is no word in the 43rd section importing any such result. In the second branch of the section imposing penalties for wilful omission, "If any property of the company is mortgaged or charged without such entry," the statute seems to concede that the security is complete on the grant of the mortgage or charge and is not invalidated by non-registry. It was not denied that even if the mortgage or debenture had been originally granted to a director or officer of the company, and had been subsequently bonâ fide transferred to a third party, it was good in the hands of the transferees though it had never been registered. The statute imposes penalties on directors, managers, and officers of the company for knowingly and wilfully permitting the omission to enter on the register the particulars required by the 43rd section, and if it was intended in addition to invalidate the unregistered mortgage or charge, if in the hands of a director, manager or officer to whom it had been granted, the statute has not said so.'

It seems to me that the decision of Malins V.C. in the case of *In re Wynn Hall Coal Company* (1), so far as it purports to rest on the construction of the language of sect. 43, cannot be sustained. Mellish L.J. says in *In re Native Iron Ore Company* (2) that the rule established by the preceding cases "is founded on a perfectly good equitable principle," but what that principle is I have been unable to discover. In the preceding part of his judgment in the same case he puts it thus: "It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company and *omits to register it* in accordance with the Act, the consequence is that he has no charge against the creditors." Is it then a personal equity against the director or officer? It may thus be put:—If the director knowingly and wilfully omits to register he is subject to a penalty of £50, and if the omission relates to a security of his own, he in addition loses his security. If there is no wilful omission, if it is innocent, as in the present instance, he nevertheless loses his security on some "perfectly good equitable principle."

(1) Law Rep. 10 Eq. 515. (2) 2 Ch. D. 345.

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Baggallay L.J. took part in the decision of *In re Native Iron Ore Company* (1), and in the subsequent case, *In re South Durham Iron Company* (2), in an elaborate judgment he states what he considers to be the principle of the prior cases thus: "If a director of a company advances money to the company, and takes as security for such advance a charge upon property of the company and omits to register such charge, he is not at liberty to avail himself of such security as against the other creditors of the company." But on what foundation does this forfeiture rest if not on the language of the statute? And there it is not to be found. It seems to me that the effect of these prior decisions has been to inflict a forfeiture which the statute does not impose, in addition to the penalty which it does. I quite concur with my noble and learned friend that we cannot add to the weighty reasons of Sir George Jessel in the case of *In re Globe New Patent Iron and Steel Company* (3), which, with him, I adopt. The prior decisions may have been wholesome, but they are not warranted by the statute, and I know of no equitable principle on which they can be sustained.

Orders appealed from reversed, with a declaration that the judgment of the House was to be without prejudice to the question whether under the particular circumstances of the case the executors of Stevens had priority of the appellants, which was not argued at the Bar or in the Courts below. The respondents to pay to the appellants the costs in the Courts below, and also to repay to the appellants the costs which they have paid in the Courts below. The respondents Keily & Stowell to pay to the appellants the costs of the appeal to this House. Cause to be remitted to the Chancery Division.

Lords' Journals 13th June 1887.

Solicitors for appellants: *Burton, Yeates, Hart, & Burton, for Johnson, Barclay, Johnson, & Rogers, Birmingham.*

Solicitors for respondents Keily & Stowell: *J. J. Keily.*

(1) 2 Ch. D. 345. (2) 11 Ch. D. 579.
(3) 48 L. J. (Ch.) 295.

[HOUSE OF LORDS.]

ANN BOUCH AND WILLIAM BOUCH . . APPELLANTS
AND
WILLIAM BOUCH SPROULE . . . . RESPONDENT.

H. L. (E.)
1887
June 13.

Company—Bonus Dividend—Capital or Income—Tenant for Life and Remainderman.

A testator bequeathed his residuary personal estate to his executor T. B. in trust for the testator's wife for her life and after her death to T. B. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends or repairing or maintaining the works. After the testator's death the directors of the company proposed to distribute certain accumulated profits (which had been temporarily capitalised) as a bonus dividend, to allot new shares (partly paid up) to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out, and with T. B.'s consent new shares were allotted to him and registered in his name, the bonus dividend on the testator's old shares being applied in part payment of the new shares :—

Held, reversing the decision of the Court of Appeal (29 Ch. D. 635), that looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life tenant was not entitled to the bonus or the new shares.

APPEAL from a decision of the Court of Appeal (Baggallay, Bowen and Fry L.JJ.) reversing a decision of Kay J. The facts are set out at length in the report of the judgments below (1) and also in the judgments of Lords Herschell and Watson in this House.

April 5, 8, 9, 12, 1886. *Graham Hastings* Q.C. and *William Freeman*, for the appellants :—

The general question raised by the appeal has been settled by a long train of authorities beginning in the last century. Whenever out of accumulated profits, which are part of the capital of

(1) 29 Ch. D. 635.

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the company, a dividend or bonus is declared in addition to the ordinary dividend, it is an accretion to the capital, and the corpus belongs to the remainderman, not to the tenant for life: *Brander* v. *Brander* (1); *Irving* v. *Houstoun* (2); *Paris* v. *Paris* (3); *Clayton* v. *Gresham* (4); *Witts* v. *Steere* (5); *Barclay* v. *Wainewright* (6); *Hooper* v. *Rossiter* (7); *Ward* v. *Combe* (8); *Price* v. *Anderson* (9); *Ex parte Hodgens, In re Hodgens* (10). The only case at variance with the current of authority is *Preston* v. *Melville* (11); probably the parties thought the decision not worth contesting. The general principle was admitted in *Plumbe* v. *Neild* (12) and *Hollis* v. *Allan* (13). See also *Nicholson* v. *Nicholson* (14); *McLaren* v. *Stainton* (15); *In re Hopkins' Trusts* (16); *Straker* v. *Wilson* (17); 2 Lindley on Partnership 3rd ed. p. 1121. In the present case the bonus was declared with a direction to appropriate it in a particular way, i.e. as capital. Secondly, if it be not all capital there should be an apportionment according as the profit accrued during the testator's life or afterwards: *Carr* v. *Griffith* (18). Under the Apportionment Act the bonus should be treated as accruing due from day to day since the last distribution in 1872. If this cannot be done by reason that it is not expressed to be paid in respect of any particular period, yet apart from the Act there should be an apportionment of what was earned in the lifetime of the testator and what has been earned since.

Rigby, Q.C., and *H. B. Buckley*, for the respondent:—

A bonus dividend becomes income as soon as it is declared whether as bonus or dividend, unless the company makes it capital. In this case it was made capital by the trustees, not by the company. It makes no difference that the dividend arose from accumulations made during the testator's life. *Irving* v. *Houstoun* (2) is a binding decision only as to bank stock. It is

(1) 4 Ves. 800.
(2) 4 Paton, Sc. App. 521.
(3) 10 Ves. 185.
(4) 10 Ves. 288.
(5) 13 Ves. 363.
(6) 14 Ves. 66.
(7) M'Cl. 527.
(8) 7 Sim. 634.
(9) 15 Sim. 473.
(10) 11 Ir. Eq. 99.
(11) 16 Sim. 163.
(12) 29 L. J. (Ch.) 618.
(13) 14 W. R. 980.
(14) 30 L. J. (Ch.) 617.
(15) 3 D. F. & J. 202.
(16) Law Rep. 18 Eq. 696.
(17) Law Rep. 6 Ch. 503.
(18) 12 Ch. D. 655.

impossible to extract any principle from the series of authorities cited by the appellants, some of which are admittedly in favour of the respondent. The question always is whether the profits have been capitalised by the company: *In re Barton's Trust* (1). See also *In re Hopkins' Trusts* (2); *Clive* v. *Clive* (3); *Wright* v. *Tuckett* (4); and *Bates* v. *Mackinley* (5). The two operations of distributing the bonus of £1500 and issuing the new shares are separable. There was no obligation to invest the £1500 in new shares; the tenant for life was entitled to take it. But since the trustee so invested it the new shares belong to the tenant for life, having been bought with her money. The Apportionment Act does not apply to such a case as the present.

Freeman, replied.

The House took time for consideration.

1887. June 13. LORD HERSCHELL:—

My Lords, this appeal arises upon a case stated for the opinion of the Court to determine whether a bonus of £2 10*s.* per share, sanctioned in the circumstances I shall afterwards mention, on 600 shares in the Consett Iron Company Limited, was income of the estate of William Bouch, or was capital of that estate.

William Bouch, who died on the 19th of January 1876, by his will bequeathed all the residue of his personal estate to Sir Thomas Bouch upon trust to convert the same into money, or with the consent of Jane Bouch (the testator's wife) to allow the same to remain unconverted; and upon further trust to permit his said wife to receive the interest, dividends, and annual income of the said personal estate during her life; and, subject thereto, he bequeathed the residue of his personal estate to Sir Thomas Bouch absolutely.

Part of the residuary personal estate of William Bouch consisted of 600 shares of £10 each in the Consett Iron Company, upon which £7 10*s.* per share had been paid. These shares were, with the consent of Jane Bouch, allowed to remain unconverted,

(1) Law Rep. 5 Eq. 238, 244.
(2) Law Rep. 18 Eq. 696.
(3) Kay, 600.
(4) 1 J. & H. 266.
(5) 31 Beav. 280.

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and she received the dividends thereon during her life. Sir Thomas Bouch died on the 30th of October 1880, having by his will appointed the appellants his executors and trustees. Jane Bouch, the tenant for life, died on the 22nd of February 1883, having by her will appointed the respondent her executor.

The Consett Iron Company was incorporated in the year 1864, with a capital of £400,000, divided into £10 shares. The articles of association provided that whenever the net profits of the company during any financial year ending the 30th of June would admit, the directors should recommend to the meeting to declare a dividend on the company's capital, and thereupon it should be competent at such meeting to make and declare a dividend of such amount, and payable at such time, as the meeting should determine. The 109th article was as follows: "The directors may, before recommending any dividend set aside out of the profits of the company such sum as they think proper as a reserved fund for meeting contingencies or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities or in such manner as they may think proper." The capital of the company was afterwards increased to £552,000 by additions of 6000 and 9200 new shares of £10 each with £7 10*s.* per share paid thereon. In the accounts of the company for the year beginning the 30th of June 1874 there stood to the credit of a reserve fund £100,000, made up from undivided profits of previous years, and there stood to the credit of another fund, styled "undivided profit," a further sum of £6203 12*s.* In August 1880 the £100,000 still stood to the credit of the "reserve fund," and in addition to the profits of the previous year £36,070 1*s.* 8*d.* was standing to the credit of the "undivided profit" fund.

The report of the directors of the 12th of August 1880, after recommending that the profits of the previous year should be appropriated to the payment of a certain dividend, and that £7246 4*s.* 5*d.* should be carried forward as undivided profit, proceeded as follows: "Your directors feel that the time is now come when they may safely recommend some permanent appropriation of the £100,000 standing to credit of reserve fund, and

of a considerable portion of the undivided profit fund. They, therefore, propose that the reserve fund, £100,000, and £38,000 out of the £43,316 6*s.* 1*d.* (to which the undivided profit would be brought up by the mode of appropriating this year's profit previously recommended), making together £138,000, shall be distributed as a bonus dividend of £2 10*s.* per share, equalling £7 10*s.* in respect of every three existing shares; but as the company's operations render it desirable to raise an equal amount as capital account, your directors propose that there be created 18,400 new shares of £10 each, with £7 10*s.* per share, payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10*s.* on each such new share. Your directors propose that the bonus dividend and the call of £7 10*s.* per new share be made payable on the 30th of September, the members registered in the company's books on the 25th of September being treated as those entitled to such dividend and to the allotment of new shares. They also propose that the new shares shall take dividend from the 1st of July 1880, as if the £7 10*s.* per share had been paid up on that date. They will, therefore, stand on an equal footing with the present shares in regard to all dividends beyond that about to be declared. Every member of the company on the 25th of September would consequently receive one new £10 share in respect of every three shares he then holds, such new share having, like the existing shares, £7 10*s.* paid thereon."

On the 4th of September 1880 the directors' report and accounts were received and adopted, and a special resolution was passed adding to the articles of association a new article, empowering the directors, with the sanction of the company in general meeting, to declare a bonus to be paid to the members in proportion to their shares out of the reserve fund, or out of any other accumulated profits of the company. Special resolutions were also passed sanctioning the creation of capital and its allotment in the manner recommended by the directors.

At a meeting of the company on the 25th of September 1880 these resolutions were confirmed, and a resolution was passed sanctioning the payment of a bonus of £2 10*s.* per share out of the £100,000 standing to the credit of the reserve fund, and

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£38,000 part of the undivided profit then in hand. On the same day the registrar of the company sent to the shareholders, including Sir Thomas Bouch (in whose name the 600 shares belonging to William Bouch's estate were registered), a letter enclosing a warrant and forms relating to the new shares.

The letter was in the following terms: "I am instructed to inform you that in accordance with the special resolutions confirmed at the meeting of the company held this day, the directors have in respect of the 600 shares now registered in your name, allotted to you 200 new shares of £10 each, subject to the sum of £7 10*s.* per share being paid up thereon on or before the 30th instant, and I enclose you a bonus dividend warrant payable on that date for £1500, which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10*s.* per share on your above named new shares. Regarding the registration of these new shares, I have to explain that if you desire to have all that you are entitled to registered in your own name, you must fill up and sign the enclosed form No. 1. If you desire to have all or part registered in some other name, form No. 2 must be filled up and signed both by yourself and by the person in whose name the shares or any of them are to be registered." The enclosed form No. 1 was as follows:—"Gentlemen—I hereby accept the 200 new shares which have been allotted to me, subject to the conditions on which they are issued, and request that the whole be registered in my own name." This was signed and returned by Sir Thomas Bouch. He also signed and returned the enclosed warrant, which was in the following form:—

"Consett Iron Company, Limited.
Bonus dividend warrant of £2 10*s.* per share payable on the 30th of September 1880.
To the members registered in the company's books on the 25th of September 1880.

No. 102.

Name of member—Thomas Bouch Esq.
Number of shares—600.
Amount of bonus dividend—One thousand five hundred pounds.
(Signed) Wm. Cockburn, Registrar.

I hereby authorize and request you to apply the above amount in payment of the call of £7 10*s.* per share on the 200 new shares that have been allotted to me in accordance with the special resolutions passed at the ordinary general meeting of the company held on the 4th of September, and confirmed at the extraordinary general meeting held on the 25th of September 1880.

Signature of member . . . .

N.B. This warrant must be signed and sent to the registrar Mr. Wm. Cockburn, 33, Westgate Road, Newcastle-on-Tyne, on or before the 30th of September 1880."

The 200 new shares were accordingly registered in the name of Sir Thomas Bouch, and £7 10*s.* was credited as paid on each share. The dividends on these new shares, as well as on the original shares, were paid to Jane Bouch, the tenant for life, down to the last dividend day prior to her death.

It is to be observed that before the allotment of the new shares in 1880, the shares of the company were at a premium of about £21 per share, but immediately after such allotment they fell to £14 per share premium.

The case came, in the first instance before Mr. Justice Kay. He considered that it might be open to doubt whether the bonus at the time it was declared belonged to the tenant for life, or was to be regarded as an accretion to capital, though, on the authority of *Paris* v. *Paris* (1) he inclined to the latter opinion. But he came to the conclusion that the bonus had been capitalised with the consent of the tenant for life, and that she had agreed that the shares should be treated as capital of the testator's estate, so as to avoid raising this question.

The Court of Appeal reversed this judgment. They held that there was no evidence to shew that the tenant for life had agreed to relinquish any of her rights, and that the bonus belonged to her, and having been invested by the trustees in shares of the Consett Company, those shares became her property.

I quite concur with the Court of Appeal in thinking that there is no evidence that the tenant for life relinquished her right to the bonus if she was ever entitled to it. And, in my judgment,

(1) 10 Ves. 185.

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the sole question for determination is whether this bonus is to be regarded as income passing to the tenant for life under the trusts of the will, or an accretion to capital, to the income of which alone she was entitled, and which enured after her death for the benefit of the remainderman.

I think this is a question of very considerable difficulty. It was argued at your Lordships' bar on behalf of the appellants that it was really settled in their favour by authority. It was said to be well established that where a dividend or bonus appeared to be declared out of accumulated profits, which, de facto, had formed part of the capital of the company, it must be treated as an addition to capital, and that the tenant for life was not entitled to it.

If I thought that any such rule had been established and were applicable to the circumstances of the present case, I should certainly advise your Lordships to decide in accordance with it, whatever I might think of its expediency. The division of the enjoyment of property between a tenant for life and a remainderman is itself artificial, and if any artificial rule has been established regulating such enjoyment, every settlor or testator may well be presumed to have intended that the objects of his bounty should share its benefits according to this rule. I may observe, however, at the outset, that there would often be considerable difficulty in the application of the suggested rule, and that it does not appear to rest on any satisfactory basis of principle.

I will proceed now to consider the authorities relied on. The earliest of these was *Brander* v. *Brander* (1), decided in 1799. The Bank of England having paid out of their funds for the public service £1,000,000, received £1,125,000 Three per Cent. Annuities. These they resolved to distribute pro ratâ among the then proprietors of Bank Stock. The question arose whether the proportion allotted to the testator's representatives was to be regarded, as between the tenant for life and remainderman, as income or capital. Lord Rosslyn took the latter view. He said: "If I am to go upon principle, I must hunt it back, and see to what part of that saving each is entitled. I have often considered

(1) 4 Ves. 800.

this question, and it seemed to me, in all the different ways I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to the capital." Lord Justice Fry says that the principle of this decision was, that what the company says is income shall be income, and what it says is capital shall be capital. "The Lord Chancellor," he says, "seems to have proceeded on the ground that the original £1,000,000 was part of the capital of the Bank;" and then, after quoting from his judgment the words I have just read, he adds: "If that were so, it follows that the Bank was distributing amongst its proprietors that which had been returned by the Government in satisfaction for the outlay of a part of its capital." I cannot concur in this view of *Brander* v. *Brander* (1). It does not appear to me to have proceeded on any such principle. The company had in no way said that either the £1,000,000 which had been advanced for the public service, or the annuities which were received in return for it, should be capital. Moreover, it is to be observed (and the importance of this will be seen when we come to consider the scope of this authority and of those which have followed it), that the Bank could not have declared that either of these sums should be added to or form part of its capital properly so called, for the Bank had no power (as is pointedly stated in the case) to increase its capital, except by obtaining an Act of Parliament.

I think the decision in *Brander* v. *Brander* (1) proceeded on the ground which Lord Justice Fry accurately states as the foundation of the judgment in *Irving* v. *Houstoun* (2), viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by reason of any declaration of the company that they should be so, but only in the sense that, having accumulated, they were, de facto, used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company, may equally be said to form part of its floating capital. And I think that the learned counsel for the appellants were well founded in saying that the greater part, if not the whole of the accumulated profits of the Consett Iron Company, the

(1) 4 Ves. 800. (2) 4 Paton, Sc. App. 521.

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division of which has given rise to this controversy, were in this sense a portion of the capital of the company.

I pass now to the case of *Irving* v. *Houstoun* (1), the most important of the series, for, being a decision of this House, your Lordships are bound by it. In that case the Bank of Scotland had passed a resolution that an extraordinary dividend or bonus should be given to proprietors holding stock on the 1st of June. Lord Eldon in delivering his opinion in this House, after stating that *Brander* v. *Brander* (2) had been frequently acted upon, and pointing out the inconvenience of having a different law as to English and Scotch bank stock, proceeded as follows: "It is impossible to deny that great difficulties attend this matter; the proper question is on which side the fewest difficulties lie. The Bank of England, to which the Bank of Scotland is similar in this respect, has a capital limited by Parliament to a certain amount. This limitation, if strictly adhered to, would have this inconvenience attached to it, that circumstances might occur to oblige them to reduce their ordinary dividends. Therefore it is that these companies have what is termed their floating capital, which they lay out in the purchase of Exchequer and Navy bills, in discounts and in every species of property that can be turned into cash at pleasure. Every person who buys bank stock is aware of this; and if he gives the life interest of his estate to any one, it can scarcely be his meaning that the life-renter should run away with a bonus that may have been accumulating on the capital for half a century." Lord Rosslyn, the only other learned Lord who expressed an opinion, said: "When I first came to consider the case of *Brander* v. *Brander* (2), I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death, and what since, to do justice between the claimants. The Bank were very much alarmed when I hinted at any intention of that kind. On considering the matter maturely in all its consequences, the judgment was pronounced in that case."

The decision in *Irving* v. *Houstoun* (1) was followed in 1804 in *Paris* v. *Paris* (3), and again in *Clayton* v. *Gresham* (4), though

(1) 4 Paton, Sc. App. 521.
(2) 4 Ves. 800.
(3) 10 Ves. 185.
(4) 10 Ves. 288.

in the former case the Lord Chancellor said that he had great difficulty in stating the principle that led to the earlier decisions. It was further followed in 1807, in *Witts* v. *Steere* (1); and again in 1847, in the case of *Ex parte Hodgens, re Hodgens*, (2), where the directors of the Bank of Ireland having decided, "on account of the favourable result of the last four years," to recommend a bonus of 5 per cent. in addition to the ordinary dividend of 4 per cent., Lord Chancellor Brady held that this bonus must be considered as capital. But a disposition was early shewn to limit the operation of the rule laid down in *Brander* v. *Brander* (3), and adopted by this House; and it is manifest that from the first it was felt not to rest on any stable principle. Thus, in *Barclay* v. *Wainewright* (4), the directors of the Bank of England declared a dividend of 5 per cent. interest and profits for the half year. It was contended that as this exceeded their ordinary dividend of 3½ per cent., a portion of it must be considered as arising from accumulated profits, and therefore treated as capital. Lord Eldon, in repelling this contention, said: "If it be contended that any part of the 5 per cent. is given out of, or to be paid from, capital, a case must be brought before the Court, either making that out by evidence, or under circumstances forming a fair ground for inquiry. But as the case now stands, I have no means of considering it as more or less than a declaration in the due execution of the right and duty of the bank that the dividend, which the proprietors ought to receive, is a half-yearly dividend of 5 per cent." And, again in *Preston* v. *Melville* (5), the directors of the Bank of England having declared a dividend of £3 10*s.* per cent. out of interest and profits for the half-year, and in addition thereto, a bonus out of interest and profits of 1 per cent., the Vice-Chancellor of England held the tenant for life entitled to both. It is to be noted that here, as in the case just cited, there was nothing to shew that the bonus was to be paid out of accumulated profits. Lord Justice Fry, commenting in the Court below on the several cases to which I have referred, says: "These cases, however binding they may be under similar

(1) 13 Ves. 363.
(2) 11 Ir. Eq. 99.
(3) 4 Ves. 800.
(4) 14 Ves. 66, 80.
(5) 16 Sim. 163.

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circumstances, with regard to the same stocks, certainly do not appear to us to support to any extent the proposition now under investigation" (i.e., that the authorities have established a rule that where a sum is paid, whether called bonus or dividend, out of the accumulations of profits in previous years, it must be taken as a payment out of, or on account of, capital). "The last case, viz., that of *Preston* v. *Melville* (1), seems to lean strongly in the other direction." Unwilling as I confess myself to be to apply the decision in *Irving* v. *Houstoun* (2), in any case where I am not bound to do so, I feel some difficulty in limiting it to the extent suggested by the Lord Justice, when I consider the language used by Lord Eldon and Lord Rosslyn. Their language seems equally applicable to any company unable to increase its capital, which uses, and is known to use (as many companies are) accumulated profits for capital purposes. I may add that, for the reason I have noted above, *Preston* v. *Melville* (1) appears to me to be in complete harmony with the earlier authorities.

It seems clear that the decision in *Irving* v. *Houstoun* (2) was not considered as applicable only to bank dividends. It was followed, as Lord Justice Fry has pointed out, in the case of other companies. Thus in *Ward* v. *Combe* (3) the question arose in 1836 in respect of certain settled shares in the London Assurance Company. At a court in 1835 the ordinary dividend of £1 a share was voted, and by another resolution on the same day it was provided that a sum at the rate of £12 per share should be taken out of the profits of the company and divided amongst the shareholders. The Vice-Chancellor held that the £12 a share was capital; and he observed that there was nothing to shew at what time the profits out of which the sum was taken arose, and that they might have been profits that had lain dormant for a series of years. It may be doubted whether this decision is altogether consistent with that in *Preston* v. *Melville* (1), already alluded to. But it is a clear recognition of the doctrine that a division of accumulated profits amongst the shareholders is to be regarded as given by way of increase of capital. It is true, indeed, as Lord Justice Fry says, that in *Price* v. *Anderson* (4), the same Vice-

(1) 16 Sim. 163.
(2) 4 Paton, Sc. App. 521.
(3) 7 Sim. 634.
(4) 15 Sim. 473.

Chancellor held in the case of the Royal Exchange Assurance Company, whose practice was to declare dividends on their stock half-yearly, and bonuses at intervals of two or more years, that a dividend of £12 10*s.* per cent. declared in 1846, in addition to the ordinary dividend, belonged entirely to the tenant for life. But it will be observed, on examining the report, that where the same company in 1840 had resolved that in addition to the ordinary dividend of £2 10*s.* per cent. a distribution of 5 per cent. out of accumulated profits be made to the proprietors, the Vice-Chancellor held that as this was not made as dividend, it must be considered capital, and ordered it to be invested. The distinction apparently was that in this case the dividend in terms was paid out of accumulated profits, and was not expressed to be a dividend.

I think, therefore, that *Irving* v. *Houstoun* (1) must still be regarded as good law, unaffected by any counter-current of authority. But it is, in my opinion, an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits and used them, in fact, for capital purposes, and afterwards distributes these profits amongst the proprietors. I think it will be seen that there is a substantial reason for the limitation I have suggested.

I quite agree with the Court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Lord Justice Fry: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit

(1) 4 Paton, Sc. App. 521.

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of all who are interested in the capital." And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such.

I come now to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital. And here I find myself constrained to differ from the conclusion at which the Court of Appeal arrived. I think we must look both at the substance and form of the transaction. It is to be observed, in the first place, that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of profits to be distributed. And it was obviously contemplated, and was, I think, certain that no money would, in fact, pass from the company to the shareholders, but that the entire sum would remain in their hands as paid-up capital. It is said in the judgment below that a shareholder who refused to take new shares, and to fill up the form of authority at the foot of the dividend warrant, would have been nevertheless entitled to receive his dividend from the company. I agree that this is so. But to my mind it was certain, and known to be so by the company, that no shareholder would make such a claim. Take the facts of the present case as an illustration. The holder of 600 shares was, we will assume, entitled to claim from the company £1500, and to decline to take any new shares. But if he had been indisposed to add any new shares to those he already held he would not have dreamed of adopting such a course. By doing so he would have received in cash £1500 only. If his desire was to have cash, instead of the new shares, he would have sold his interest in the new shares, and signed the second form enclosed in the registrar's letter, and the authority at the foot of the dividend warrant. For he would thus have obtained from a purchaser, not £1500 but probably upwards of £4000. It is said by Fry, L.J., that the two transactions, of the payment of the dividend and the

payment of the call, could not be carried into effect as one operation, inasmuch as, in the case of a person holding less than three shares, or holding a number not a multiple of three, the dividends on the odd share or shares must, in the absence of arrangement with some other member, have been paid in cash. But it must be remembered that the directors undertook to afford facilities for the sale or exchange of fractional parts of new shares, and such arrangements were so obviously to the advantage of those entitled to fractional parts of a share, that it was certain they would be effected. I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares. And the form in which the operations were effected points in the same direction. The dividend warrant is not in the ordinary form. It is assumed that it will be signed by the member only at the foot of the authority to apply the amount in payment of the calls on the new shares. And it is intimated on the face of it that it must be "signed and sent" to the registrar before the 30th of September, 1880. Moreover, the letter of the registrar enclosing it contains these terms, "which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10*s.* per share on your above-named new shares." It is to be observed also that although the bonus was not sanctioned until September, and the £7 10*s.* per share was expressed to be made payable on the 30th of September, the new capital was to rank for dividend pari passu with the old capital from the 30th of June preceding, which is only explicable on the ground that these moneys, in the hands of the company, and which were, in fact, in use as capital, were to be so treated as from that date.

Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern.

I therefore move your Lordships that the judgment of the Court below be reversed, and the judgment of Kay, J., restored, and that the respondents do pay the costs in the Court of Appeal, and the costs of this appeal.

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LORD WATSON :—

My Lords, I am of opinion, with the learned judges of the Court of Appeal, that the present case does not come within the principle to which this House, following the decision of the Lord Chancellor in *Brander* v. *Brander* (1), gave effect in the Scotch case of *Irving* v. *Houstoun* (2).

In the first of these cases the Bank of England, and in the second the Bank of Scotland, whose constitution gave them no power to increase their capital, had, nevertheless, for a long period of years, retained and employed a large amount of accumulated profits as capital, in the course of their business; and they ultimately paid a considerable portion of these accumulations to their shareholders in the shape of bonus. In *Irving* v. *Houstoun* (2) the Lord Chancellor (Lord Eldon) appears to me to have come to the conclusion that the bonus belonged to the fiar, and not to the liferentrix of the testator's shares in the Bank of Scotland, upon two grounds. He expresses the opinion, in the first place, that these accumulated profits, which he describes as the floating capital of the bank, were regarded by the testator and the other owners of bank shares, as being in the nature of capital; and in these circumstances, his Lordship says, "if he (i.e., the testator) gives the life interest of his estate to any one, it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century." In the second place, his Lordship intimates his opinion that on no ground of equity could it be contended that the liferentrix was entitled to accumulations made during the lifetime of the testator; and that an inquiry into the precise amounts of profit which had accrued before and after the commencement of the liferent right would lead to inconveniences which would be intolerable. The Earl of Rosslyn, who had, as Chancellor, decided *Brander* v. *Brander* (1), concurred in the judgment. His opinion, so far as reported, proceeds upon the second ground stated by Lord Eldon. He said: "When I first came to consider the case of *Brander* v. *Brander* (1), I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death, and

(1) 4 Ves. 800.

(2) 4 Paton, Sc. App. 521.

what part since that period, to do justice between the claimants. The Bank were very much alarmed when I hinted any intention of this kind. Upon considering the matter maturely in all its consequences, the judgment was pronounced in that case, holding the bonus to be an accretion to the capital."

The Consett Iron Company, Limited, stands in a different position from these two banks. By the 109th of its articles of association the directors are empowered, before recommending any dividend, to set aside, out of the profits of the concern, such sum as they may think proper "as a reserved fund for meeting contingencies or for equalising dividends, or for repairing or maintaining the works connected with the business of the company or any part thereof." The company has likewise under its articles the power, which it exercised in 1872, of increasing its capital by the creation and allotment of new shares to its members according to their respective interests, and of crediting them with a sum as paid on each share from its reserved or undivided profits. It is also worthy of observation, although in the view which I take of this case the circumstance is not material, that the books of the company were kept, and the annual balance-sheets issued to the shareholders prepared in such a form as to disclose the precise amount of profit and loss upon each year's trading; and that the parties have consequently been enabled to state in their joint case the exact proportion of the reserved profits in question which accrued during the currency of the life tenant's right. So that the obstacles to an inquiry, which were regarded as insuperable in *Brander* v. *Brander* (1), and *Irving* v. *Houstoun* (2), do not exist in the present case.

I do not doubt that the rule applied by this House in *Irving* v. *Houstoun* (2) must receive effect in all similar cases. But in a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company. I entirely concur in the observations made upon this point by Lord Hatherley

(1) 4 Ves. 800. (2) 4 Paton, Sc. App. 521.

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(then Vice-Chancellor) in *In re Barton's Trust* (1): "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain." In my opinion that rule must obtain, whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purposes of its business.

Applying these principles to the present case, I am unable to concur in the view which the Court of Appeal has taken of the real character of the arrangements under which the Consett Iron Company, on the 25th of September, 1880, issued a bonus dividend warrant, and a relative allotment of new shares, to each and all of the shareholders of the company.

The balance-sheet of the company for the year ending the 30th of June 1880 states as an asset a sum of £100,000, which had, in the year 1874, been carried from the undivided profits of previous years to a reserve fund, and had subsequently been entered, under that heading, in the books and balance-sheets of the company. I do not think (and so far I agree with the learned judges of the Court of Appeal) that the mere fact of moneys being taken from undivided profits and carried to a reserve fund is equivalent to their capitalisation. But the whole or part of the reserve fund may be legitimately expended on the repair and maintenance of works and plant, in such a way as to make it practically unavailable for the purpose of paying dividend, so long as there is no increase of the capital of the company, and the works continue in operation. The balance-sheet of the 30th of June 1880 shews that, in point of fact, not only the whole reserve fund of £100,000, but a large additional sum of undivided profits had, at that date, been spent upon, and were represented by, not cash or convertible securities, but the works and plant of the company.

In these circumstances it was undoubtedly within the power of

(1) Law Rep. 5 Eq. 244.

the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalise these sums by issuing new shares against them to its members in proportion to their several interests. I am of opinion that the latter alternative was, in substance, that which was followed by the company.

The directors issued their annual report on the 12th of August 1880, to which a copy of the balance-sheet was annexed. In their report they recommended "to the shareholders some permanent appropriation of the £100,000 standing to credit of reserve fund, and of a considerable portion of the undivided profit fund." These words do not suggest either the realisation of the works and plant in which the funds had been invested, or the creation of new shares, for the purpose of raising moneys for distribution among the shareholders. What they do suggest is, the permanent appropriation of the moneys to the capital purposes to which they had already been temporarily appropriated. In order to attain that object, the directors proposed that the reserve fund and £38,000 of undivided profits, together amounting to £138,000, "shall be distributed as a bonus dividend of £2 10*s.* per share, equalling £7 10*s.* in respect of every three existing shares, but as the company's operations render it desirable to raise an equal amount on capital account, your directors propose that there be created 18,400 new shares of £10 each, with £7 10*s.* per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10*s.* on each such new share." The directors further proposed that the bonus dividend and the call of £7 10*s.* per new share should be made payable on the same day; that the shareholders whose names appeared in the register on the 25th of September 1880 should be entitled to the dividend and to the allotment of new shares; and that the new shares should stand on an equal footing with the old as from the 1st of July 1880.

The report of the directors was received and adopted, without reservation, at the ordinary annual meeting of the company, held upon the 4th of September 1880. Various resolutions were

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passed by the company at that and also at subsequent meetings; but I do not consider the terms of these resolutions as of material importance, because they merely provide the requisite machinery for enabling the directors to carry into effect the scheme suggested in their report. For the same reason, I do not think any importance can be attached to the form of the dividend warrant and allotment of new shares, which was subsequently issued to the shareholders by the officers of the company. None of these documents can, in my opinion, affect the substance of the scheme, which was recommended in the report of the directors and adopted by the company.

At the time when that scheme was submitted, the capital of the company consisted of 55,200 shares of £10 each, with £7 10*s.* paid up per share. Before the proposal to issue new shares was made, the old shares were selling at a premium of £21 per share, but after the allotment of new shares the premium fell to £14. The executor of William Bouch held 600 old shares, which belonged to the remainderman. The selling value of these shares was, in consequence of the adoption of the new scheme, diminished by £4200. The bonus on the shares was only £1500; but the value of the 200 new shares, with that sum imputed as paid upon them, was £4300. If the company had offered to its members a choice between the bonus dividend and new shares with £7 10*s.* paid on each, no sane shareholder would have elected to take the dividend. If William Bouch's executor had done so, the life-tenant would have benefited to the extent of £1500, but the estate of the remainderman would have been depreciated in value to the extent of £4200. I doubt whether, in the case supposed, it would be the duty of an executor to choose the bonus and reject the shares; but I am satisfied that in the present case no such option was given by the company.

I am unable to resist the conclusion that, in adopting the scheme recommended by the directors the company must have intended that each shareholder should get an allotment of new shares, and that the money declared to be payable as dividend, which was not in the coffers of the company and did not exist in a form available for distribution, should not be paid to the shareholder, but should simply, by means of an entry in the company's books, be imputed in payment of the call of £7 10*s.* upon each

new share. That is plainly indicated in the report as the necessary result of the shareholders agreeing to the proposals therein made. It states expressly that if the shareholders sanctioned these proposals "every member of the company, on the 25th of September, would consequently receive one new share in respect of every three shares he then holds, such new share having, like the existing shares, £7 10*s.* paid thereon and leaving £2 10*s.* uncalled." If I am right in my conclusion the substantial bonus which was meant to be given to each shareholder was not a money payment but a proportional share of the increased capital of the company. In that view of the facts it does not admit of doubt that the benefit must accrue to the remainderman and not to the tenant for life.

I am accordingly of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of Mr. Justice Kay restored.

LORD BRAMWELL:—

My Lords, the authorities bearing on the question in this case are, to my mind, very unsatisfactory. I can deduce no principle from them. Cases have been decided differently where the facts were the same, because different words had been used. This, in my opinion, can never or very rarely be right. There seems to have been a confused notion that undivided profits at some time and somehow became capital.

The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money he has got, let him have got it how he may. A sole trader with a capital of £10,000 who makes in a year a profit of £2000 and spends £1000 only, leaving the other £1000 in his business, may well in the next year be said to have a capital of £11,000; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by *all* the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading.

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For example, a company makes a profit of £10,500 in a year. Suppose its capital to be £200,000, it divides the £10,000 giving 5 per cent. to its shareholders; trading with the £500 as with its other funds. It does this for four years with the same result of profit and dividend. At the end of the fourth year its undivided profits, including those brought forward, are £12,000, and it can and does pay 6 per cent. to its shareholders. Can there be a doubt of its right to do so? Is it not the fair and just thing as between a tenant for life and remainderman? I say yes, and if true for four years it is true for forty.

I think the right rule would be that contended for by Mr. Rigby. Make the date of the division the date for considering the rights. All profits made up to that date, unless by the articles of partnership or subsequent agreement of the shareholders, are profits to which the tenant for life is entitled though they have been used in the business. I think that is the opinion of the Court of Appeal (29 Ch. D. 655, at paragraph beginning "Before examining," &c.).

Now to apply such a principle to this case, had the company simply divided their profits and reserve fund to the extent they disposed of them and created no new shares, Mrs. Bouch would have been entitled to £2 10*s.* on each of the 600 shares, that is £1500. The 600 shares would have been less in value £2 10*s.* each, and would have been worth each £26, or in all £15,600 instead of £17,100, as they were at the time of the arrangement. By doing what they did, that is, creating the new shares and paying the £7 10*s.* on each new share, every share, new and old, became worth three-fourths only of what a share was worth before, and the total value of the 800 shares was the same as of the 600 before, viz. £17,100.

But applying the above reasoning to the facts that took place, it seems to me impossible to say that in reason or on any legal consideration Mrs. Bouch could be entitled to the 200 new shares. For if so the remainderman's right would be only to the 600 shares remaining, which at three-fourths of the £28 10*s.* would make them worth only £12,825, the new 200 being worth £4275. The tenant for life cannot have a right to the new shares.

But it may be said that this reasoning shews she had a right

to the £1500. To this I think there are two answers, not that it would not have been a reasonable thing to have given the £1500 to her and to have made some different arrangement for the new shares; but there are, I say, two answers. First, the authorities are against her. But, secondly, I think it must be taken that there was an agreement by all parties, the company and its shareholders, and if necessary I should say by tenant for life and remainderman, certainly by those whose case we are considering, that new shares should be created, and that undivided profits should be applied to the payment of £7 10s. on each new share. If I am asked what Mrs. Bouch gained by consenting to this I cannot say. Perhaps her consent was no more than non-dissent. Perhaps if she thought about it at all, she did not think she could help it. Perhaps she could not. For it was the offer made by the company to the shareholders which was to be accepted or refused as a whole.

I agree with the first answer of the Court of Appeal, "that the bonus of £2 10s. was income of the estate of William Bouch" to this extent—that in reason and in right it should have been so treated. But I differ from the second answer, which is a sort of conclusion from the first. It is an erroneous conclusion in my opinion. It assumes that £7 10s. bought a new share. It did not. For the price of the new share was that sum and the diminished value of the old shares.

On these considerations, and agreeing with the noble and learned Lords who have already spoken in their reasoning and their view of the authorities, I am of opinion that this judgment should be reversed.

LORD FITZGERALD:—

My Lords, I concur with my noble and learned friends, and am of opinion that, for the reasons given, the judgment of the Court of Appeal should be reversed. At the close of the argument at your Lordships' Bar I had arrived at the conclusion that the directors of the Consett Iron Company, acting within their powers, had so dealt with the extra allowance or bonus made to the shareholders out of accumulated profits and reserve fund as to make that "bonus" capital and not income. I differ from the

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Court of Appeal, not in its able exposition of the law, but as to the proper inferences to be deduced from the admitted facts. Fry L.J. puts the question thus: "There remains another question, namely, whether the way in which the declaration of this bonus or dividend was coupled with the creation of new capital did or did not amount to a capitalisation of the bonus?" Upon this question I have felt myself unable to follow the Court of Appeal, and I adopt the view of Kay J. The reasoning and the decision of Lord Hatherley in *In re Barton's Trust* (1) then directly apply.

The proceedings at the ordinary general meeting of the 4th of September 1880, and the documents which emanated from it, together with the resolutions of confirmation, have been so carefully and critically examined by Kay J. and by my noble and learned friends, that I can add nothing. I adopt their view of the facts, and the proper inferences to be drawn from them.

The opinion which I had formed at the close of the case, and to which I adhere, renders it unnecessary for me to criticise any of the endless chain of decisions by which the argument was supposed to be illustrated.

Judgment appealed from reversed; order of Kay J. restored (2); *the respondent to pay the costs of the appeal to this House and the costs in the Court of Appeal, and also to repay to the appellants the costs paid by them of the proceedings before Kay J. and in the Court of Appeal; cause remitted to the Chancery Division.*

Lords' Journals 13th June 1887.

Solicitors for appellants: *G. H. Barber & Son.*

Solicitor for respondent: *R. T. Jarvis* for *Hutchinson & Lucas, Darlington.*

(1) Law Rep. 5 Eq. 238.

(2) The order of Kay J. expressed the opinion that the bonus of £2 10s. per share sanctioned on the 25th of September 1880 on the 600 shares in the Consett Iron Company, Limited, was capital of the estate of the testator William Bouch, deceased: And declared that the plaintiff as executor of William Bouch's widow was not entitled to payment of the amount of the bonus or any part thereof, nor to the 200 new shares allotted to Sir Thomas Bouch or any part thereof: And ordered accordingly.

[HOUSE OF LORDS.]

TREVOR AND ANOTHER . . . . . APPELLANTS; H. L. (E.) 1887 July 11.

AND

WHITWORTH AND ANOTHER . . . . . RESPONDENTS.

Company Limited—Power of Company to purchase its own Shares—Reduction of Capital—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12, 26—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9–20—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.

A limited company was incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for:—

Held, reversing the decision of the Court of Appeal, that such a company has no power under the Companies Acts to purchase its own shares, that the purchase was therefore ultra vires, and that the claim must fail.

The reasoning of the Court of Appeal in *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76) disapproved.

APPEAL from a decision of the Court of Appeal.

James Schofield & Sons Limited were incorporated in 1865 under the Companies Act 1862 with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares.

Several of the articles of association dealt with the purchase of shares by the company. In the view which the House took it is necessary to refer only to two.

Article 179. "Any share may be purchased by the company

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from any person willing to sell it, and at such price, not exceeding the then marketable value thereof, as the board think reasonable."

Article 181. "Shares so purchased may at the discretion of the board be sold or disposed of by them or be absolutely extinguished, as they deem most advantageous for the company."

The company having in 1884 gone into liquidation in the Court of Chancery of the County Palatine of Lancaster, a claim was made against the company by the respondents, as executors of Whitworth a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for. The circumstances under which the purchase in question and other purchases by the company of its own shares were effected are stated in the judgments.

A summons having been taken out by the appellants, the official liquidators, to determine whether the claim ought to be allowed, the Vice-Chancellor of the county palatine made an order declaring that, without prejudice to any claim by the claimants against any persons other than the liquidators and the company, the claim against the company ought not to be allowed.

The Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversed this decision and allowed the claim. Against this decision the liquidators now appealed. The only question material to this report being the general question, whether such a company can purchase its own shares, the arguments on the other points are omitted.

March 18, 21, 22, 24. *Rigby* Q.C. and *O. Leigh Clare* for the appellants: —

The purchase of its own shares by a limited company incorporated under the Companies Acts is ultra vires and invalid, and this whether there is or is not power given in the memorandum of association. It is not indeed necessary to go that length in the present case, for the memorandum gave no power to the company to purchase its own shares, and the memorandum cannot be extended to objects foreign to its scope by the articles of association. That portion of the articles therefore which authorizes

such a purchase is invalid and the contract of purchase was ultra vires, and no subsequent ratification could avail anything: *Ashbury Railway Carriage and Iron Company* v. *Riche* (1); *Cree* v. *Somervail*, per Lord Blackburn (2); and *In re Dronfield Silkstone Coal Company*, per Jessel M.R. (3). But independently of that point, such a purchase is inconsistent with the Companies Acts: it is in reality a reduction of capital in a manner different from that required by those Acts. That this is so is clearly shewn by the judgment of Jessel M.R. in the last-named case. See also the observations of James L.J. in *Hope* v. *International Financial Society* (4). In the earlier cases the distinction between authority given in the memorandum and authority given in the articles was not fully recognised: the question was generally argued on the articles. But no authority in the memorandum could confer such a power on a limited company. The surrender of shares is another matter and may be lawfully made without reducing the real capital, but no reduction of capital otherwise than as allowed by statute is legitimate, whether the purchase of its own shares by a company be carried out by way of trafficking or otherwise.

[The following cases were also discussed at length: *Wright's Case* (5); *Snell's Case* (6); *Zulueta's Claim* (7); *Hall's Case* (8); *Teasdale's Case* (9); *Colville's Case* (10); *In re Balgooley Distillery Company* (11); *Guinness* v. *Land Corporation of Ireland* (12).]

Romer Q.C. and *A. C. Maberley*, for the respondents contended that the articles of association must be construed so as to authorize only such purchases as would be consistent with the memorandum: that here the purchase was or might be incidental to the carrying on of the business of the company, and was therefore authorized by the memorandum. That it might well be necessary to buy out hostile shareholders or to prevent nominees of a rival company from becoming shareholders: as in *In re Dronfield*

(1) Law Rep. 7 H. L. 653.
(2) 4 App. Cas. 648, 666.
(3) 17 Ch. D. 76, 83.
(4) 4 Ch. D. 327, 336.
(5) Law Rep. 12 Eq. 331.
(6) Law Rep. 5 Ch. 22.
(7) Law Rep. 5 Ch. 444.
(8) Law Rep. 5 Ch. 707.
(9) Law Rep. 9 Ch. 54.
(10) 48 L. J. (Ch.) 633.
(11) Ir. L. R. 17 Ch. D. 239.
(12) 22 Ch. D. 349.

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Silkstone Coal Company (1), a strong authority for the respondents. That the question being one of domestic management and the object being to keep the company a family concern, such a transaction would be legitimate, and would not amount to a reduction of capital as prohibited by the Companies Acts; and that if the directors had used their powers improperly they would be personally liable. They also referred to *Marshall* v. *Glamorgan Iron and Coal Company* (2); *Taylor* v. *Pilsen Joel and General Electric Light Company* (3); and relied on *Phosphate of Lime Company* v. *Green* (4), a case expressly treated as a sale by Willes J.

Rigby Q.C. replied.

The House took time for consideration.

July 11. LORD HERSCHELL:—

My Lords, three questions are raised by this appeal: first, whether certain shares in James Schofield & Sons Limited were purchased by G. W. Schofield on his own account, or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and thirdly, whether the company had power to purchase the shares.

James Schofield & Sons Limited was incorporated under the Companies Acts on the 31st of May 1865, with a capital of £150,000 in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company on the 6th of May 1884 it was resolved that the company should be wound up voluntarily, and on the 15th of May following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding-up should be continued under the supervision of the Court.

By an affidavit filed on the 1st of October 1884 the respondents claimed from the company in the winding-up £2873 12*s.* A

(1) 17 Ch. D. 76.
(2) Law Rep. 7 Eq. 129.
(3) 27 Ch. D. 268.
(4) Law Rep. 7 C. P. 43.

summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but, upon appeal, this decision was reversed.

On the 1st of May 1880 G. W. Schofield bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (twenty-eight fully paid up, 500 with £6 paid, and five with £5 paid), for the price of £3305, the purchase-money to be paid within three years then next, at such time as the buyers should appoint, and interest at 5 per cent. to be paid by the buyers until completion. Interest was accordingly paid in the meantime, and on the 3rd of May 1883 a transfer of the shares was executed by the vendors and G. W. Schofield.

On the 5th of May a receipt was given to G. W. Schofield for the sum of £3305 for shares bought. But £505 only having been in fact paid, a promissory note was on the same day given to the appellants for £2800 "deposited on loan at 5 per cent. per annum, interest from date." This was signed "for J. Schofield & Sons, Limited. G. W. Schofield, director."

The first question is, whether this transaction was entered into by G. W. Schofield on his own account, or as agent for the company. If the former, it is clear that Schofield was guilty of a gross fraud. Upon a review of the evidence I see no ground for coming to such a conclusion. I think the purchase of the shares was in fact made by him on behalf of the company.

The question whether, assuming the company had power to purchase its own shares, the purchase was effected in accordance with the articles of the company, is one of much greater difficulty. The article empowering the company to purchase its shares is as follows: "Article 179. Any share may be purchased by the company from any person willing to sell it, at such price, not exceeding the then marketable value thereof, as the board think reasonable." Now there is not the slightest evidence that the directors ever considered, either at a formal meeting of the board or otherwise, the question whether these shares should be purchased. The utmost that can be said to be established is that the directors other than G. W. Schofield, who negotiated the purchase, knew

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that the respondents had come to see him upon the subject. But further, the only authority to buy was at such price not exceeding the then market value as the board should think reasonable. The par value of the shares was apparently given in this case, as in the case of the other purchases, as a matter of course, and I see no reason to believe that any judgment was exercised upon the point by the board.

But although I think it far from clear that even if it was competent for the company to purchase the shares, this transaction can be supported, I do not intend to pronounce an opinion upon this point, because, in consequence of the view which I believe all your Lordships entertain upon another part of the case, it is unnecessary to do so.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is

(1) Law Rep. 7 H. L. 653.

said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act 1862 requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a

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company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might

sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company.

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Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield &c. Co.* (1): "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's Case* (2) Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hope* v. *International Financial Society* (3) that learned judge said: "I am reported to have said in *Teasdale's Case* (2) that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz. to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations, a company having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be reissued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a purchase of shares in the sense of trafficking in

(1) 17 Ch. D. 76.

(2) Law Rep. 9 Ch. 54.

(3) 4 Ch. D. 327, 336.

shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche* (1). That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that therefore was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of *Guinness* v. *Land Corporation of Ireland* (2), Lord Justice Cotton, after referring to sect. 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member

(1) Law Rep. 7 H. L. 653. (2) 22 Ch. D. 349, 375.

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cannot be returned to him. In my opinion, it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of *In re Dronfield Silkstone Coal Company* (1). In that case disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is *inchoate*, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Company* v. *Green* (2). In that case the learned judges

(1) 17 Ch. D. 76. (2) Law Rep. 7 C. P. 43.

appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.

LORD WATSON:—

My Lords, these points were discussed in the argument upon this appeal: Was the purchase of 533 shares of "James Schofield & Sons, Limited," from the respondents, in May 1880, made by G. W. Schofield for behoof of the company, with the sanction of its directors? If so, was the transaction ultra vires of the company? The order appealed from cannot stand if either of these questions be answered in the negative.

I think it is established by the evidence that both parties to the agreement of May 1880 understood, and acted upon the footing, that the purchase was made by G. W. Schofield for the company, and that G. W. Schofield, after the shares were transferred to him in May 1883, held, or at least, intended to hold, them as trustee for the company. I doubt whether it is also proved that the purchase was submitted to and considered and approved by the board of direction, in terms of the articles of association; but I do not think it necessary to determine that point, because I am of opinion that, assuming the transaction to have been duly completed in accordance with the articles, it was nevertheless ultra vires of the company.

In order to appreciate the real character of the transaction, it is necessary to advert to the position of the concern, and its

(1) Law Rep. 7 H. L. 653.

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course of dealing in the purchase of its own shares. The company was registered with limited liability in the year 1865, for the purpose of carrying on the business of manufacturing flannel goods, and it continued to trade from that time until April 1884, when it went into liquidation. Its nominal capital was £150,000 in 15,000 shares of £10 each. None of its shares were sold in the market after July 1875, and no dividend was paid after the year ending the 31st of December 1877; but at the date of the liquidation the company had acquired by purchase, and then owned, 4142 of its own shares, of which 3609 were entered in the register in the name of "Jas. Schofield & Sons," a firm which had no existence, and the remainder (the 533 shares in question) in the name of G. W. Schofield. All of these shares had been bought by the company at par, or, in other words, not at market value, but for the amount which had been paid upon them by previous holders; and 1389 shares were purchased, on these terms, between May 1880 and the date of the liquidation.

In the case of the 533 shares, the price was made payable three years after the date of the agreement of sale, in exchange for a transfer, the purchaser meantime paying interest at 5 per cent., and undertaking to indemnify the sellers from further calls. Interest was regularly paid from the funds of the company, and the transaction was closed in May 1883 by a transfer of the shares to G. W. Schofield, the sellers giving a receipt for the full price (£3305) on receiving payment of £505 in cash and being credited in the books of the company with £2800, the amount of the unpaid balance, as a loan to the company. That is the sum which the respondents claim in the liquidation, and for which the Court of Appeal has held that they are entitled to rank in competition with the creditors of the company.

The articles of association of "James Schofield & Sons, Limited," give the directors very extensive powers to purchase its own shares for the company; and it is provided (article 181) that "shares so purchased may at the discretion of the board be sold or disposed of by them, or be absolutely extinguished, as they deem most advantageous for the company." These powers are of course unavailing, in so far as they may include purchases which are either beyond the scope of the memorandum of association

or contrary to the provisions of the Companies Acts. But I assent to the respondents' argument that they must be construed ut magis valeant quam pereant, and must be held to authorize all purchases of the company's shares effected on its behalf by the directors, which can be shewn to have been legitimate and within the objects specified in the memorandum.

In the case of a company limited by shares, the Act of 1862 requires that the amount of its capital, and the shares into which it is divided, shall be set forth in the memorandum of association; and sect. 12, which prescribes the extent to which the conditions contained in the memorandum may be modified, empowers the company to increase but not to diminish its capital. That limitation has been so far relaxed by the Act of 1867 as to permit a company to reduce its capital, with the sanction of the Court, after due notice to creditors, upon such terms as the Court may think fit to impose. The Act of 1877, upon the preamble that doubts had been entertained whether the power of reduction given by the preceding Act extended to paid-up capital, enacts (sect. 3) that the word "capital," as used in that Act, shall include paid-up capital. That declaration clearly expresses the will of the legislature that neither the paid-up nor the nominal capital of the company shall be reduced otherwise than in the manner permitted by the statutes.

One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume

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that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company, the shareholder being relieved of liability for future calls, whilst the share itself reverts to the company, bears no dividend, and may be re-issued. When shares are purchased at par, and transferred to the company, the result is very different. The amount paid up on the shares is returned to the shareholder; and in the event of the company continuing to hold the shares (as in the present case) is permanently withdrawn from its trading capital. It appears to me that, as the late Master of the Rolls pointed out in *In re Dronfield Silkstone Coal Company* (1), it is inconsistent with the essential nature of a company that it should become a member of itself. It cannot be registered as a shareholder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern bring no addition to its capital.

In *Teasdale's Case* (2), which was frequently referred to in the argument before us, James L.J. is reported to have said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." There was no question of purchase in that case, which related to a surrender of original shares in exchange for new shares, by means of which the nominal capital of the company was largely increased, whilst the paid-up capital remained intact. The learned Lord Justice took occasion to modify the opinion thus attributed to him in the subsequent case of *Hope* v.

(1) 17 Ch. D. 76, 83.

(2) Law Rep. 9 Ch. 54.

International Financial Society (1). In that case, the purchase of its own shares was not one of the specified objects of the society; but the directors were authorized to purchase the shares of certain members who desired to withdraw from the concern, by a special resolution of the society, which provided that shares purchased in terms thereof should not be re-issued by the board without the authority of a general meeting. The Court of Appeal, affirming the decision of Bacon V.C., held that the scheme involved an improper application of its funds, and was ultra vires of the company. James L.J. said (2): "Mr. Kay, it appears to me, has succeeded in placing his opponents on the horns of a dilemma. Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." He clearly distinguishes the case of purchase from that of surrender. After referring to his reported observations in *Teasdale's Case* (3) as being too wide a deduction from the authorities, and unnecessary for the decision of the case, he says: "But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally, and to a small extent, it may be said to diminish the capital." The present Master of the Rolls and Baggallay L.J. followed the same line of reasoning with James L.J. They agreed that the resolution of the company to purchase and hold its own shares, subject to the disposal of a general meeting, was in substance either a resolution to deal in the shares, which was outside the memorandum of association, or a resolution to reduce its capital, which was contrary to the provisions of the Companies Acts. The decision of the learned judges would, I apprehend, have been the same if the directors had been authorized to make the purchase by the articles of association. No authority thereby given could have enlarged the scope of the memorandum, or overcome the statutory prohibition.

(1) 4 Ch. D. 327. (2) 4 Ch. D. 335.
(3) Law Rep. 9 Ch. 54.

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Mr. Romer did not, in the course of his able argument for the respondents, impeach the soundness of the decision in *Hope* v. *International Financial Society* (1). He sought to extricate his clients from the dilemma presented in that case by endeavouring to shew that the purchase of the 533 shares in question was, in a reasonable sense, incidental to the carrying on of the proper business of "James Schofield & Sons, Limited," or was at least a legitimate piece of domestic management, and was therefore within the scope of the memorandum; and, upon that assumption, he argued that the transaction was not in contravention of the Companies Acts, although it might lead to some diminution of capital. His argument was mainly rested upon *In re Dronfield Silkstone Coal Company* (2), an authority requiring consideration, because it is in respect of the principle said to be thereby established that the Court of Appeal has, in this case, given judgment for the respondents.

Other authorities were relied on by the learned counsel, but these (with one exception) I think it unnecessary to notice, because they were cases either of surrender of shares, or of cancellation of allotments, and did not involve any question of purchase.

In *Phosphate of Lime Company* v. *Green* (3) a dispute had arisen between the company and two of its shareholders, which was eventually compromised. As stated by Willes J., "An arbitration was proposed, and negotiations took place between the directors and Green and Nicholls, which resulted in a compromise on or about the 24th of July 1866. That compromise in effect was that, instead of paying back the money advanced to them, and returning the debenture bonds, Green and Nicholls should give up to the company 400 shares, on which £10 per share had been paid up, to be cancelled; and it was agreed that this should be considered as a settlement of the claim of the company against them." The learned judges, in delivering their opinions, assumed that the transaction had the character of a sale of the shares, and was struck at by the 19th of the company's articles of association, which expressly prohibited the purchase of its own

(1) 4 Ch. D. 327. (2) 17 Ch. D. 76.
(3) Law Rep. 7 C. P. 43, 54.

shares under any circumstances; but they held that the shareholders, with full knowledge of the transaction, had ratified that which had been done by the directors. None of the learned judges seem to have considered whether the transaction was within the limits of the memorandum, or consistent with the provisions of the Companies Acts.

In deciding *In re Dronfield Silkstone Coal Company* (1) the Court of Appeal had fully in view the previous decisions of this House in *Ashbury Railway Carriage and Iron Company* v. *Riche* (2), and of their predecessors in *Hope* v. *International Financial Society* (3). It appears from the report that disputes had arisen between the board of directors and Ward, one of their number, from whom and his partner Addy the company had a sub-lease of coal mines which it worked, and that these disputes seriously interfered with the business of the company. In order to terminate their differences the parties entered into an agreement sanctioned by a special resolution of the company, in terms of which Ward, on the 25th of March 1872, transferred his shares to the company for £5000, and of the same date executed, along with Addy, a separate indenture, by which they assigned to the company their whole interest as lessees for the sum of £10,000. The company was registered as owner of the shares shortly after the execution of the transfer in 1872, and retained them until 1879, when a winding-up order was obtained. At the time of the transfer, and for several years following, the business of the company was prosperous, and large dividends were paid. The liquidators included Ward in the list of contributories, and, in an application for the removal of his name, the late Master of the Rolls (Jessel) held that the transfer was void as being not only outside the objects of the memorandum, but a diminution of the paid-up capital forbidden by the Companies Acts, and consequently that Ward was still liable to contribute. His judgment was reversed by the Court of Appeal, who directed the applicant's name to be removed from the list. Cotton L.J. was of opinion that the purchase having been made in the interest of the company, and not being in any sense a traffic in shares, did not go beyond the

(1) 17 Ch. D. 76. (2) Law Rep. 7 H. L. 653, 667.
(3) 4 Ch. D. 327.

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memorandum, and that it was not such a diminution of capital as the statutes prohibit. Upon the latter point his Lordship observed (1): "The principal argument of the respondent against the validity of the transaction was that it was a reduction of the capital of the company. If this transaction is to be held invalid on that ground, I do not see how a surrender or forfeiture of shares is ever to be supported." James L.J. was also of opinion that dealing with shares which did not amount to traffic was not beyond the scope of the memorandum, and he regarded the transaction as "a mere domestic matter," which could not be questioned after the company had first confirmed it and had then acquiesced in it and taken the benefit of it.

In *Guinness* v. *Land Corporation of Ireland* (2) Cotton L.J. thus explained the principle upon which *In re Dronfield Silkstone Coal Company* (3) was decided. "The article there empowered the directors in their discretion to apply money in purchasing shares so as to get rid of shareholders who caused difficulty in the internal management of the company; and as the power had been used, and reasonably used, for that purpose, and not as a means of diminishing the capital of the company, the shares not being in any way cancelled or put an end to, but being re-issuable, we were of opinion that the directors had the power which they purported to exercise."

When a company, in order to get rid of a troublesome shareholder, buys his shares and continues to hold them, as in *In re Dronfield Silkstone Coal Company* (3), the object may be different, but the result, so far as regards the capital of the company, is precisely the same as if it had purchased the shares as an investment. If the shares are purchased with the view of being re-sold, that is simply a speculation with the funds of the company. If they are purchased with the view of their being retained by the company, that is a permanent withdrawal of the money invested in them from the trading capital of the company. I do not agree with Cotton L.J. in thinking that if such a transaction is invalid no forfeiture or surrender could be supported. When shares are forfeited or surrendered and not re-issued, that affects

(1) 17 Ch. D. 94. (2) 22 Ch. D. 349, 378.
(3) 17 Ch. D. 76.

only the nominal amount of the shares so far as unpaid; when they are bought and not re-issued that diminishes the paid-up as well as the nominal capital.

Notwithstanding the general prohibition of alterations upon the memorandum of association which diminish the capital, whether paid-up or nominal, of a company limited by shares, the Companies Acts contemplate the possibility of diminution of unpaid capital in certain cases, although the memorandum remains unaltered. Sect. 26 of the Act of 1862 and the regulations of Table A. (17 to 22) shew plainly that the legislature intended companies to have the power of forfeiting shares. There is no reference in the Acts to surrenders of shares; but these have been admitted by the Courts upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding in invitum, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares. Whatever may be the case in regard to surrender, I do not think the purchase of its own shares by a company bears any analogy to forfeiture. It appears to me that a transaction by which, as in this case and in *In re Dronfield Silkstone Coal Company* (1), the company gave back his money to the shareholder, and accepted and held the shares in his stead, in point of fact operates as a diminution of its paid-up as well as of its nominal capital; and I have been unable to discover any good reason why such a diminution should be held to be legal in the face of statutory enactment to the contrary.

I am not prepared to say, nor is it necessary to say, that the decree in *In re Dronfield Silkstone Coal Company* (1) directing the removal of Ward's name from the list of contributories was erroneous. If his non-liability to contribute in the liquidation had been wholly dependent upon the original validity of the agreement of March 1872 for the sale and purchase of his shares, I should have agreed with the decision of the late Master of the Rolls; but it appears to me that there were special circumstances in that case which might have justified the order made by the Court of Appeal, although I am unable to concur in the reasoning

(1) 17 Ch. D. 76.

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upon which it was based. The respondents are not resisting an attempt by the liquidators to include them in the list of contributories; they are seeking to enforce in a question with creditors the contract under which their shares were transferred to the company, and their success must depend upon the validity of that contract.

In the present case I should have been of opinion, even on the assumption that the reasoning of the Lords Justices in *In re Dronfield Silkstone Coal Company* (1) was sound, that the purchase of the respondents' 533 shares was a transaction ultra vires of the company. It was not an isolated transaction with a single troublesome shareholder who was obstructing the business of the company, but was part and parcel of a scheme carried out by the directors under the articles of association, by which they acquired for the company more than one-fourth of the whole shares of its undertaking, and returned to the shareholders from whom they purchased more than one-fourth of its paid-up capital. It does not appear to have formed any part of the scheme to re-sell or re-issue the shares; and matters stood in the position I have described at the date of the liquidation. I do not doubt that, as suggested by the learned judges of the Court of Appeal, the object of the directors was to keep "James Schofield & Sons Limited" as a sort of family concern, which was a perfectly lawful object if pursued by legitimate means. But the directors and shareholders of a company limited by shares who desire to have the concern in the hands of themselves and their friends, and to keep its shares out of the market, ought to use their own money for that purpose and not the trading capital of the company. In my opinion the application of the company's funds in furtherance of any such object is altogether illegitimate, because it is foreign to the proper business of the company and in violation of statute law. If it were held to be incidental to the business of the company and not a diminution of its capital, there seems to be no reason why "James Schofield & Sons Limited" should not have purchased at par a half or two-thirds, instead of a fourth, of its own shares.

I concur, therefore, in the judgment which has been moved.

(1) 17 Ch. D. 76.

LORD FITZGERALD:—

My Lords, upon the first two questions raised by the appellants it is not necessary to express any opinion.

The third question is one of great public importance, and one cannot but feel satisfied that at last it has come to the point where it is necessary to pronounce an authoritative decision upon it.

Upon carefully reading the two very elaborate opinions which have been already delivered upon this subject, and the very weighty opinion which has yet to be delivered by my noble and learned friend who sits near me (Lord Macnaghten) and deliberately considering them, I have laid aside what I intended to be my own judgment, and I need only state my entire concurrence in those opinions. I consider that the decision which the House has arrived at is a most wholesome one in the public interests.

I wish to advert to a case to which I called attention in the course of the argument, in which a very elaborate judgment was delivered by FitzGibbon L.J.—I refer to *In re Balgooley Distillery Company* (1). I think that affords the ablest criticism which has taken place up to this morning upon the authorities and upon the question which we have now to determine.

LORD MACNAGHTEN:—

My Lords, the learned counsel for the appellants raised three points for your Lordships' consideration.

In the first place, they contended that the shares belonging to Whitworth's executors, which were the subject of the agreement of May 1880, were not really purchased on behalf of the company. From facts either proved or admitted, and from documents in evidence, they asked your Lordships to infer that in making that agreement George William Schofield was acting on his own account, though he meant all the while to treat the company as the purchaser if the bargain turned out to be a bad one. That is a charge of dishonesty for which, as far as I can see, there is not a shadow of foundation.

In the next place, assuming the purchase clauses in the articles

(1) Ir. L. R. 17 Ch. D. 239.

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to be valid, it was contended that the requirements of those clauses were not duly complied with. This is a more difficult question. In the unsatisfactory state of the evidence I do not propose to give any final opinion upon it. I will only make one or two observations. Article 179 provides that "any share," that is, any share in James Schofield and Sons Limited "may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then market value thereof, as the board think reasonable." Now it does not appear that the board ever exercised any judgment or thought in the matter. From the year 1875 the company's shares were not saleable or sold in the market, or dealt with by the public. After that date any shares that any member wished to sell were bought by the company as a matter of course. Except in a few instances where shares were sold below their par nominal value, the price given was invariably a sum equal to the amount paid up, and that, although the company was steadily going from bad to worse, trading at a loss, and at the same time borrowing money to buy up the shares of members who wanted to withdraw. Why the price was kept up under these circumstances it is not necessary to inquire. Whatever the reason may have been, the sum which the Board agreed to pay for the shares belonging to Whitworth's executors cannot, I think, by any figure of speech, be described as the market value or as bearing any relation to the market value of the shares. If that be so, there seems to be a difficulty in the way of enforcing against the company the completion of a contract founded on something like a breach of trust on the part of the directors.

The third point is one of general importance. It raises the question whether it is competent for a company formed under the Act of 1862, on the principle of limited liability, to purchase its own shares when it is authorized by its articles to do so. The consideration of that question, as it appears to me, necessarily involves the broader question whether it is competent for a limited company under any circumstances to invest any portion of its capital in the purchase of a share of its own capital stock, or to return any portion of its capital to any shareholder without following the course which Parliament has prescribed. If the

case were not in some degree embarrassed by the decision in *In re Dronfield Silkstone Coal Company* (1), and by dicta in earlier cases, I should answer both questions in the negative without the slightest doubt or hesitation. It appears to me that the notion of a limited company taking power to buy up its own shares is contrary to the plain intention of the Act of 1862, and inconsistent with the conditions upon which, and upon which alone, Parliament has granted to individuals who are desirous of trading in partnership the privilege of limiting their liability.

The Act of 1862 requires that the objects for which a limited company is established shall be stated in its memorandum. Those objects cannot be enlarged by anything to be found in the articles, or by anything outside the memorandum. Whatever may fairly be regarded as incidental to the objects stated in the memorandum, the company is authorized to do. Everything beyond that is prohibited. Further, every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount. That is equivalent to a declaration that the capital is to be devoted to the objects of the company. The effect of that statement, taken in connection with sect. 38, is explained very clearly by Cotton L.J. in *Guinness* v. *Land Corporation of Ireland* (2). After commenting on sect. 38 the Lord Justice proceeds thus:—"From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

If that be a correct exposition of the law, as I think it is, it seems to me to be decisive on the present question. If the purchase of shares in James Schofield & Sons, Limited, was not one of the objects of that company, how could its capital be properly employed in that purchase? Bowen L.J. indeed, founding himself on *In re Dronfield Silkstone Coal Company* (1), assumes that

(1) 17 Ch. D. 76. (2) 22 Ch. D. 349, 375.

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cases may occur where the purchase of its own shares is incidental to the legitimate objects of a limited company, and such a case he considers the present to be. On that two observations arise. If the exercise of such a power can be regarded as incidental to the objects of a limited company, there seems to be no need for giving the power in express terms either in the memorandum or in the articles. Every company must have it. Every company may exercise it in a proper case. In the next place, whatever may be thought of the special circumstances to be found in *In re Dronfield Silkstone Coal Company* (1), there were no special circumstances here. It was said that the company was a family company. But a family company, whatever the expression means, does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company. It can have no special privilege or immunity. It was said that the board did not want Whitworth's shares to be sold to outsiders, or put on the market. Unfortunately there was nothing special in that. That was part of the regular practice of the company, a practice which became more and more confirmed as the company's affairs became more and more embarrassed. The company's balance-sheets for the last few years of its existence are in evidence. On the one side, among the debit items, they shew the amount due to the company's bankers; on the other side, under the head of "shares purchased," they shew the amount spent by the company in the purchase of its own shares. The figures are instructive. In December 1880 the company owed its bankers, who were secured creditors, £20,202. Up to that date, from its commencement in 1865, it had spent £16,202 in the purchase of its own shares. By December 1883 the debt to the bankers had increased to £30,490, and the sum spent in the purchase of its shares amounted to £32,935. By means of these purchases that large sum, more than one-fifth of the nominal capital of the company, had been withdrawn from the fund to which, as Cotton L.J. says, the creditors have a right to look. In 1884 the company went into liquidation, and the creditors are unpaid.

In the face of the figures to which I have referred, Mr. Romer,

(1) 17 Ch. D. 76.

who argued the case for the respondents with extreme ability and ingenuity, hesitated to maintain that the particular purchase was incidental to the objects of the company. But he urged that the vendors had nothing to do with that; they were not concerned with the management of the company. It was enough for his argument if it were conceded that the purchase of its own shares might be incidental to the objects for which the company was formed. Your Lordships then asked in what case, and under what circumstances, such a purchase could be said to be incidental to the objects of a limited company. In answer to that question the learned counsel not unnaturally turned to *In re Dronfield Silkstone Coal Company* (1), and suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out shareholders whose continuance in the company was undesirable. That was the way in which the proposition was put in *In re Dronfield, &c., Co.* (1), where matters had come to a deadlock. But I would ask, Is it possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine? Who are the shareholders whose continuance in a company the company or its executive consider undesirable? Why, shareholders who quarrel with the policy of the board, and wish to turn the directors out; shareholders who ask questions which it may not be convenient to answer; shareholders who want information which the directors think it prudent to withhold. Can it be contended that when the policy of directors is assailed they may spend the capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics?

I took the liberty during the argument of referring to a case which is reported under the name of *Harben* v. *Phillips* (2). It was the case of a large shipping company, in which the shareholders were divided into two hostile camps. One party, with the old directors at their head, wished to make London the port of departure for their fleet. The other party were determined that the business should remain at Southampton. Both sides were perfectly honest, each was fully convinced that the company would be ruined if the view of their opponents prevailed. Could

(1) 17 Ch. D. 76.

(2) 23 Ch. D. 14.

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it be suggested that in such a case directors might lawfully employ the company's funds in buying up a sufficient number of shares to silence opposition? Or is the purchase allowable only when the undesirable shareholder stands alone, and the other members are all of one mind? In the latter case the action of the directors may not be open to misconstruction. But still the purchase would not be "a mere domestic matter," as it was termed by James L.J. in *In re Dronfield Silkstone Coal Company* (1). It must involve the employment of funds which have been dedicated to other purposes, and the use or misuse of which concerns other persons besides the shareholders. Nor can it be considered incidental to the objects of the company merely because it may be very convenient. After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from the common misfortune of having to pay for what one wants out of one's own purse, when there is no other way of getting it. If the capital proposed to be expended in the purchase of its shares is "in excess of the wants of the company," the transaction may be carried out under the provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company's wants, it certainly ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be attained by means to which no exception can be taken. If shareholders think it worth while to spend money for the purpose of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on a fund in which others as well as themselves are interested. That, I think, is the law, and that is the good sense of the matter.

There remains, however, a more serious objection still. It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void. There are two conditions of the memorandum—the condition defining the objects of the company, and the condition defining its capital,—one or both of which would

(1) 17 Ch. D. 76.

be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a "lawful purpose" within the meaning of sect. 6 of the Act of 1862? If it were the only object of the company, no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day, or allow a quotation to any company which purports to have the power of buying its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so-called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of Cotton L.J., who thought the power in the present case valid, because it was only "a power to authorize the board, whenever they thought it desirable for the purposes of the company, to buy the shares." The condition would then run thus: "The capital of the company is £150,000 in 15,000 shares of £10 each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so." It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form.

So far I have not relied upon the Acts of 1867 and 1877, which are to be construed as one with the Act of 1862, because I think the question is clear on the earlier Act; but I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed

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conditions and restrictions are observed. Now the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power "to pay off any capital which may be in excess of the wants of the company," and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or "the payment to any shareholder of any paid-up capital." It follows that if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in sect. 26; every company is to return to the registrar of joint-stock companies once a year "the total amount of shares forfeited." There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

My Lords, if you agree in the result at which I have arrived, you will prevent a distinction being set up between the powers of statutory corporations governed by the Companies Acts, and the powers of those governed by the Companies Clauses Acts, for

which, as it appears to me, it would be difficult to find any foundation in reason. In the Companies Clauses Consolidation Act 1845, provision is made for forfeiture, and for forfeiture only. By the Companies Clauses Act 1863, companies are authorized to accept surrenders of shares not fully paid up, but it is expressly enacted that "the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share." It has never been suggested, so far as I am aware, that a company governed by the Companies Clauses Acts can purchase its own shares. Your Lordships have held that the principles which were laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), as to the limit of the powers of incorporated companies, apply with equal force to companies governed by the Companies Acts and to companies incorporated by special Act of Parliament. It would be a singular thing if your Lordships were compelled to hold that one class of companies can purchase its own shares while the other is prohibited from so doing.

It is necessary to say a few words with regard to the decision of the Court of Appeal in *In re Dronfield Silkstone Coal Co.* (2). Much reliance, of course, was placed on that decision, and your Lordships were warned against the danger of disturbing its authority, having regard to the time which has elapsed since it was pronounced, and to the probability of its having been acted upon to a considerable extent. So far as my experience goes, that decision has never been recognised in the profession as an authority for the general proposition that a limited company may purchase its own shares; and I am confirmed in this view by the criticisms on the case to be found in Mr. Buckley's well-known work, and in the notes in Mr. Palmer's excellent collection of precedents. I do not think that your Lordships' judgment in the present case will touch the decision in *In re Dronfield Silkstone Coal Company* (2), though it will of course displace much of the reasoning on which that case was decided. If I may respectfully say so, though I agree with the reasoning of the late Master of the Rolls (Jessel) on the main point, still I think the decision of the Court of Appeal was right. It seems to me that it may be

(1) Law Rep. 7 H. L. 653. (2) 17 Ch. D. 76.

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supported on very simple grounds. Mr. Ward's name was not on the register when the company was ordered to be wound up. To make him a contributory it was therefore necessary to rectify the register. After winding up, the Court has that power under sects. 35 and 98. But it is a judicial power, as it has been called, and it is to be exercised by the Court, to use the language of sect. 35, "if satisfied of the justice of the case." Those are not mere idle words. They mean, I think, what they say. Although they have been sometimes overlooked, Lord Cairns, I may observe, relied upon them in *Sichell's Case* (1), as shewing that the Court is bound to go into all the circumstances and to consider what equity the applicant has to call for its interposition. Now the arrangement under which Ward retired was an honest arrangement. It was in accordance with a provision of the articles, which had never been determined to be invalid. It was expressly sanctioned at an extraordinary general meeting, at which all the shareholders were present with the exception of the holder or holders of 11 shares out of 1600. Ward's name was off the register for seven years. During part of that time the company had been extremely prosperous, and all the shareholders who remained in the company had received dividends largely increased by reason of Ward's retirement. Moreover, there was no creditor whose debt was incurred while Ward was a shareholder, or who had been induced to trust the company by having Ward's name held out as a member. The power to make a person who is not on the register contribute to debts when the company is wound up is a power given by statute. The same statute requires the Court, before exercising the power, to be satisfied of the justice of the case. In *In re Dronfield, &c., Co.* (2) the liquidator, as representing shareholders, had no equity; he had none as representing creditors. It would be a strange travesty of justice to compel a person to pay debts with which he has nothing to do, at the instance of an applicant who has no equity to set the Court in motion.

The present case is wholly different from *In re Dronfield Silkstone Coal Company* (2). There it was sought to undo a transaction which could not be undone altogether so as to restore the

(1) Law Rep. 3 Ch. 119.

(2) 17 Ch. D. 76.

parties to their original position, and which could not be undone at all without committing injustice. Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company. Under these circumstances the application ought, I think, to have been refused by the Court of Appeal as it was by the Vice-Chancellor.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the appeal allowed with costs.

Order appealed from reversed; Order of the Vice-Chancellor of the County Palatine of Lancaster restored; the respondents to pay to the appellants the costs in the Court of Appeal and in this House, and to repay to the appellants all moneys and costs received from them; cause remitted to the Chancery of the County Palatine of Lancaster.

Lords' Journals July 11th 1887.

Solicitors for appellants: *Gregory, Rowcliffes, & Co. for Addleshaw & Warburton, Manchester.*

Solicitors for respondents: *Marsland, Hewitt, & Everett, for Grundy & Lamb, Manchester.*

[PRIVY COUNCIL.]

J. C.* 1886 Dec. 7. 1887 Feb. 19.

ATTORNEY-GENERAL OF QUEENSLAND Appellant;

AND

GIBBON . . . . . Respondent.

ON APPEAL FROM A DETERMINATION OF THE LEGISLATIVE COUNCIL OF QUEENSLAND.

Queensland Constitution Act of 1867, *sects.* 23 *and* 24—*Construction—Seat in Council vacated.*

Where a statute provided that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant;" and a councillor absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time in the event covered the whole of the first and part of the second session:—

Held, that his seat was vacated. The permission did not cover two successive sessions.

THIS was an appeal under the circumstances stated in the judgment of their Lordships from a determination of the legislative council dated the 10th of September, 1885, that the seat of the respondent in the said council had not become vacant under the provisions of Queensland Constitution Act of 1867, sect. 23. The appeal was in accordance with sect. 24.

Sir *Horace Davey*, Q.C., and *Arbuthnot*, for the appellant.

The respondent did not appear.

1887 Feb. 19.

The judgment of their Lordships was delivered by

Lord Hobhouse:—

The difficulty in this case arises from the circumstance that Mr. Gibbon received permission to absent himself, not during any specified sessions of the legislature, but for a definite period of time not coinciding with the sessions that have been held.

* *Present*:—Lord Bramwell, Lord Hobhouse, Lord Herschell, Sir Barnes Peacock, and Sir Richard Couch.

His leave of absence was for one twelvemonth, viz., from the 23rd of December, 1882, to the 23rd of December, 1883. He was actually absent, first, during the session which began in June and ended in July, 1883; secondly, during the session that began in November, 1883, and ended in March, 1884; and, thirdly, during the session which began in July and ended in December, 1884. In the course of the next session the question arose whether his seat had become vacant.

He had thus been absent during the whole of three sessions, but his leave of absence covered the whole of the first and a portion of the second, so that it cannot be said that he was absent during two successive sessions without a permission extending to some portion of those sessions. The question is, whether such a permission prevents Mr. Gibbon's seat from becoming vacant. The question was referred by the legislative council to a committee of five, who sifted it very carefully, and by a majority of three to two decided that the seat was not vacated, and reported in that sense. The council adopted the report, which therefore comes to their Lordships with all the weight due to that decision.

The effective words of the statute are, that "If any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant." The word "fail" is not applicable only to cases of wilful or negligent failure. It would apply also to the case of failure wholly blameless, e.g., from the illness of the councillor. "Fail to give his attendance," then, is equivalent to "be absent from." And the section therefore is to be read, "If any legislative councillor shall, for two successive sessions, be absent from the said legislative council without permission." Without permission for what? Why, absence for two successive sessions. Mr. Gibbon has had no permission to be, and has been, absent for two successive sessions. To say that permission to be absent for one, or a period including one, prevents the application of the provision, is in effect to say that permission cannot be given to be absent for one session without its operating in effect for two sessions.

In their Lordships' opinion the statute treats the non-attendance which entails a penalty as an entire thing, and they consider that

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the permission which is relied on to avoid the penalty must be for that entire thing.

They think the object of the enactment is attained by this construction. Absence, short of two sessions, even by one day, is attended with no consequences. But absence for two sessions vacates the seat unless leave is given for a period covering such absence as a whole. It is absence on the last day added to the prior absence that has to be justified by permission, and that permission must be for whole absence.

They must, therefore, humbly advise Her Majesty to allow the appeal, and declare that Mr. Gibbon's seat became vacant. No costs against him are asked for.

Solicitors for the appellant: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* 1886 *Nov.* 10, 27; *Dec.* 4. 1887 *March* 5.

In re THE ENDOWED SCHOOLS ACT, 1869, AND AMENDING ACTS;

AND

In re THE FREE GRAMMAR SCHOOL AND HOSPITAL OF ARCHBISHOP HOLGATE AT HEMSWORTH, AND THE GRAMMAR SCHOOL AT BARNSLEY;

AND

In re THE SCHEME RELATING THERETO UNDER THE SAID ACTS.

Endowed Schools Act, 1869 (*c.* 56), *ss.* 5, 9, 11, *and* 19—*Removal of Site—Vested Interests*, *s.* 11—"*Due regard.*"

Held, that the removal of the site of a school is within the scope of the Endowed Schools Act, 1869, and the powers conferred on the Commissioners by sect. 9;

That an annual sum temporarily applied to the purposes of the school is an endowment within the meaning of sect. 5;

That sect. 19 does not relate to an endowment which has been (whatever

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* *Present:*—THE LORD CHANCELLOR (LORD HALSBURY), LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

its original foundation) subjected to a scheme providing that religious instruction in the liturgy, catechism, and articles of the Church of England shall be given, not to all boys, but to the boys of parents in that communion and the boys of other parents who do not object thereto in writing:

That "due regard" (see *In re Hodgson's School*, 3 App. Cas. 869) had under the circumstances been paid to the educational interests contemplated by sect. 11.

"Entitled," in sect. 11, means legally entitled.

In re Sutton Coldfield Grammar School (7 App. Cas. 91) followed.

The interest of a boy on the foundation of a school is not saved or directed to be compensated by the Act of 1869, unless he was there at the date of the passing thereof.

THESE were two appeals, one by the trustees of Hemsworth Hospital and Grammar School, and the other by parents of children at present attending the school, against a scheme framed by the respondents, the Charity Commissioners for England and Wales, and submitted by them to the Committee of Council on Education, and approved by the said Committee.

The nature of the scheme, so far as is material, and the grounds upon which the appeals were made, appear in the judgment of their Lordships, but these latter may be summarised as follows:—

(1.) There is no power in the Acts to move the site of the school.

(2.) A sum of £300 temporarily applied by the trustees of Hemsworth Hospital is not an endowment or an educational endowment which could be dealt with as proposed.

(3.) Due regard had not been paid to the educational interest of that class of persons, and of persons in that class of life, who now have advantages in the matter of education which it is proposed to abolish or misapply.

(4.) As to religious instruction, the school is within the exception of sect. 19 of the Act of 1869.

Arthur Charles, Q.C., and *Jeune*, for the trustees above mentioned.

Cripps, for the parents of scholars.

Sir *Horace Davey*, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners.

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In re THE FREE GRAMMAR SCHOOL AND HOSPITAL OF ARCHBISHOP HOLGATE AT HEMSWORTH, AND THE GRAMMAR SCHOOL AT BARNSLEY.

March 5. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (LORD HALSBURY):—

The trustees of this endowment have appealed to Her Majesty in Council under the provisions of the Endowed Schools Act, 1869, against the scheme framed by the Charity Commissioners and approved by the Education Department. They have taken four grounds of objection.

The first objection is that the removal of the site of the Grammar School from Hemsworth to Barnsley is not within the scope of the Act. Removals of sites are not expressly mentioned in the Act. On the other hand, they are clearly within the range of the powers conferred on the Commissioners by sect. 9, which authorizes them to make any new trusts, directions, and provisions in lieu of any existing ones. It is difficult to say that any operation which is within the powers conferred by the Act is not within its scope. But without relying absolutely on sect. 9, their Lordships find in the preamble ample ground for saying that the legislature contemplated that the removal of sites might be found expedient. That preamble refers to the report of the Commission of Inquiry and to the changes recommended by it, and states that such objects cannot be effected without the authority of Parliament. Except on one or two specific points, the Act supplies no other guide to the objects at which the Commissioners should aim. Mr. Charles did not dispute that one object much insisted on by the report was the removal of schools from localities where they are of little or no use to other localities where they may be of great use. He only contended that in this case the removal is injurious to the frequenters of the schools. That raises a question of policy, which may be submitted to the Education Department or to the House of Parliament, but which is not the subject of appeal. Their Lordships have no hesitation in saying that the removal is within the scope of the Act.

The second objection is of the same kind, only directed to a small portion of the scheme. Under a scheme made by the Court of Chancery on the 28th of July, 1857, for Archbishop Holgate's Hospital in Hemsworth, a sum of £300 a year is devoted to the purposes of Holgate's Grammar School, and it is provided that the trustees of the hospital may, after the expira-

tion of thirty-six years, if they shall be of opinion that the Hemsworth Grammar School is not in an efficient state, apply to the Court for liberty to discontinue the payment. It is suggested that the removal of the school from Hemsworth disturbs the provisions of the Chancery scheme, and affects the revenues of the hospital, which is an endowment not within the Act. Their Lordships are of opinion that this yearly payment is so long as it lasts an educational endowment within sect. 5 of the Act, and that the power given by the Chancery scheme to the trustees at the end of thirty-six years is not in any way disturbed by the present scheme.

The third objection is founded on what are commonly called the conscience clauses, which are introduced by the 48th clause of the scheme. This is a point on which the Commissioners have no discretion. They must embody in their scheme the provisions of sects. 15 and 16 of the Act, unless the case falls within the exceptions provided by sect. 19. The trustees contend that this endowment does fall within that section.

The exceptions allowed by sect. 19 apply to "any educational endowment the scholars educated by which are . . . required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder, or under his authority during his lifetime, or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or be instructed according to the doctrines or formularies of any particular church, sect, or denomination." The trustees contend that Archbishop Holgate's statutes order that the scholars shall be instructed according to the doctrines and formularies of the Church of England, and that such course of instruction has always been followed.

Their Lordships will not enter upon the controversy whether Holgate's statutes prescribe what the trustees contend, or whether the usages he prescribed were, or could be, followed down to the commencement of the Act of 1869. On the 27th of June, 1861, the Court of Chancery established a new scheme for this endowment, and that scheme is the instrument by which it is at present governed. At that time the question now raised must have been before the Court. For in 1860 the rules governing endowments on these points were altered by the Act commonly known as

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Lord Cranworth's Act, 23 & 24 Vict. c. 11. That Act binds all governors of endowed schools to make rules to provide for admitting to the benefits of the school the children of parents not in communion with the church, sect, or denomination according to the doctrines or formularies of which religious instruction is to be afforded under the endowment. But it excepts from this obligation all cases in which the instrument regulating the endowment contains nothing expressly requiring the children educated under such endowment to learn or to be instructed according to the doctrines or formularies of such church, sect, or denomination. That exception has a wider range than the exception in the Act of 1869, but it rests on the same principle, and on the point now in controversy is expressed in the same terms. The Court of Chancery provided, in the 31st clause of the scheme of 1861, that religious instruction in the liturgy, catechism, and articles of the Church of England shall be given, not to all boys, "but to such of the boys whose parents, or persons standing to them in loco parentis, shall be in communion with that Church, and to such other boys whose parents, or other persons standing to them in loco parentis, shall not object in writing to their receiving such instruction." The framers of the scheme must have considered that this endowment did not fall within the exception of the Act of 1860. But even if we suppose that they gave no consideration to the matter, or that they construed Holgate's statutes wrongly, the scheme has in point of fact effected a breach of the system on which the trustees contend that the school was administered from the time of its foundation. After the 27th of June, 1861, it ceased to be an endowment the scholars educated by which were required to learn or to be instructed according to the doctrines or formularies of the Church of England.

The fourth objection belongs to a class of questions attended by great difficulties, difficulties which must be very serious to the Commissioners who have to decide in the first instance, and are greater still to those who sit in appeal, because the Commissioners must be guided very much by discretion, and appeals on matters of discretion are proverbially difficult. The trustees contend that the Commissioners have not obeyed the directions given to them by sect. 11 of the Act of 1869.

That section is as follows :—

"It shall be the duty of the Commissioners in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as inhabitants of a particular area or otherwise, to have due regard to the educational interests of such class of persons."

By sect. 5 of the Endowed Schools Acts, 1873, the protection thus given to particular classes of persons is extended to persons in a particular class of life.

The first step, then, is to ascertain to what privileges or advantages any classes are entitled under the scheme of 1861, which now regulates the endowment. It will be remembered that Holgate founded a grammar school for teaching Hebrew, Greek, and Latin, and in other respects of a type that was generally found to be quite unsuitable for the wants of the great bulk of persons using the schools in later times. The Court of Chancery, therefore, divided the foundation into two parts. The scheme of 1861 provides for the maintenance of a grammar school in Hemsworth open to all comers on payment of substantial fees. This school is of the type now generally known as first grade (clauses 18, 29, 37, 48). It provides also for the maintenance of an elementary school, called the parish school, in Hemsworth, open to the parishioners of Hemsworth at small fees, with power of remission in cases of poverty (clauses 18, 34, 38, 39). Then there is a provision adopted from Holgate's statutes, that the trustees shall elect "from poor men's children, being husbandmen, or men of occupations, living in the parishes of Hemsworth, Felkirk, South Kirby, Ackworth, Royston, and Wragby," six boys to be educated free of cost. These boys may be admitted at the age of five years, and are to be entitled to the education of the grammar school; but if not of ability to be placed there, are to be first placed in the parish school (clause 36). There is a further provision for the election of a Holgate scholar from among the six free boys, with emoluments which may amount to £30 a year for five years (clause 51). But this is only to be effected when there are sufficient funds, which, as their Lordships understand, has not yet occurred.

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Under the present scheme, then, the parishioners of Hemsworth are a class entitled to have the parish school maintained in Hemsworth; and the poor men, being husbandmen or men of occupations, living in the six parishes, which expressions their Lordships hold to mean generally the poor of the parishes, are entitled to have the six boys elected from among them, and to a Holgate scholar when the funds are sufficient; all to be educated in one of the Hemsworth schools.

It is contended that the inhabitants of Hemsworth are entitled to have the grammar school maintained in Hemsworth. But, in the *Sutton Coldfield Case* (1) it was held that the word "entitled" must be construed strictly, meaning "legally entitled." Now, the grammar school is open to all comers, and, as a matter of law, the inhabitants of Hemsworth have no higher title than the public at large. Undoubtedly they enjoy advantages from the proximity of the school, but so do other persons who are near enough to use the school; and that incidental advantage does not confer a legal title. It is true that actual enjoyment would be one thing to be considered on the question of due regard, but so also would be the value of the thing enjoyed, and the extent to which it is enjoyed. And it is clear that the proposal to remove the grammar school rests on the fact that the work it does is quite insignificant.

The next step is to ascertain how far the scheme abolishes or modifies the privileges or advantages of any class. As regards the parish school, which provides for the mass of the parishioners of Hemsworth, the effect is that that school is left in possession of whatever it now has, and has its resources augmented by the addition of £40 a year. But the scheme combines the endowment of the grammar school with that of Barnsley, and establishes the joint school in Barnsley. To that extent it modifies the privileges of the poor inhabitants of the six parishes. The scheme provides for six Holgate scholarships, which shall entitle the holder to free education and also to £10 a year. But instead of being educated at the grammar school in Hemsworth, which will not exist, the scholarships are to be tenable at the grammar schools in Barnsley, or in Wakefield, Pontefract, or Doncaster (clause 53). And, instead of electing the scholars from "poor

(1) 7 App. Cas. 91.

men, being husbandmen, or men of occupations," in the six parishes, the trustees are to elect from "boys who are and have for not less than three years been scholars in any of the public elementary schools" in the six parishes.

It is clear that the Commissioners have paid regard to the privileges and advantages now existing. But the trustees say it is not due regard. How difficult it is to lay down what is due regard is shewn by the judgment of this Court in the case of *Hodgson's School* (1). There the scheme abolished certain privileges, and gave nothing substantial in lieu of them; and it was found impossible to say there had been due regard. But even then this Committee came reluctantly to their conclusion, and their language shews that any substantial privilege adapted to the altered construction of the school would have satisfied them that due regard had been paid.

It seems not unreasonable to ask those who complain of want of due regard, to suggest what would be due regard, especially when they are the trustees of the endowment, and are possessed of the fullest knowledge of all its circumstances. Now in this case the trustees held a conference with Mr. Fearon, an assistant Commissioner, on the 18th of August, 1882. They were then under the belief that the proposal to remove the school could not be resisted, and they made proposals on that footing. Their proposals, so far as they affect the scheme, were as follows:—(1) that an additional £40 per annum should be applied to the parish school; (2) that £60 per annum should be provided for exhibitioners, being children of parents living in the six parishes; (3) that the new school should be of the second grade. All the proposals have been carried into effect, only with the modification that the exhibitioners are to come from elementary schools.

The draft scheme proposed scholarships of £5 a year, and a larger number than six. Upon that the trustees recommended that there should be only six of the value of £10, because, considering the distance from Hemsworth to Barnsley or Pontefract, a scholarship of £5 a year would practically be of little benefit to children of parents residing in the six parishes. In accordance with this recommendation the Commissioners altered the number and amount of the scholarships.

(1) 3 App. Cas. 869.

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The draft scheme did not contain the provision which confines the scholarships to boys at the elementary schools, and on the 11th of October, 1883, the trustees sent in objections, the first of which was that the class of life and area of habitation of original beneficiaries is almost entirely disregarded. Upon this the Commissioners, conceiving that the objection as to class meant that the interests of the poor had been disregarded, inserted the limitation to elementary schools.

It is admitted by the counsel for the trustees that this limitation is as good a way as can be devised for securing the benefits of an endowment to the poorer classes. But it turns out that they complain of this very limitation, and contend that the "poor men, husbandmen and men of occupations" mean the substantial middle class, and that it is this class who are injured by a provision calculated to benefit the poorer classes. As before intimated, their Lordships hold that it is the poorer classes who were meant mainly to benefit by the free places. They must hold this somewhat novel objection of the trustees to be a groundless one, and say that the Commissioners have paid due regard to the privileges and advantages which their scheme modifies.

There is another petition by a number of persons who state that they are parents of children attending Hemsworth School. They take the same objections as the trustees take, and also the objection that the scheme does not save or make due compensation for their vested interest and the vested interest of their sons, as required by the Endowed Schools Acts. These gentlemen have no locus standi for appealing except in respect of vested interests. The Act does not direct that any interest of a boy on the foundation of a school shall be saved or compensated unless he was there at the time of the passing of the Act, viz., on the 2nd of August, 1869. Of course there is no such boy. The petition fails, and ought not to have been presented.

Their Lordships will humbly advise Her Majesty that both appeals ought to be dismissed.

Solicitors for trustees: *Andrew, Wood, & Glasier.*
Solicitors for Charity Commissioners: *Farrer & Co.*
Solicitor for other petitioners: *J. C. Patteson.*

[PRIVY COUNCIL.]

THOMAS SOMERVILLE (FOR THE FIRM OF TURNBULL, JUNIOR, & SOMERVILLE) . } PLAINTIFF;

AND

PAOLO SCHEMBRI (FOR THE FIRM OF SCHEMBRI & NAVARRO) AND GIOVANNI BATTISTA CAMILLERI . . } DEFENDANTS.

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Feb. 10;
March 5.

ON APPEAL FROM THE COURT OF APPEAL FOR MALTA.

Law of Malta—Trade-marks—Right to exclusive User—Infringement.

In Malta there is no law or statute establishing the registration of trade-marks, and no authority exists from which an exclusive right to a particular trade-mark can be obtained.

But by the general principles of the commercial law, as soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm.

Where cigarettes made by the appellant's firm became favourably known under the trade-mark "Kaisar-i-Hind," *held* (1) that the use of that trade-mark by others for hats, soap, pickles, &c., could not impede the acquisition of an exclusive right to it as a trade-mark for cigarettes; (2) that the respondents should be restrained from using for cigarettes a copy of the said mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by the appellant's firm.

APPEAL from a judgment of the Court of Appeal (March 28, 1885), reversing a decision of the Court of Commerce (Nov. 18, 1884), and dismissing the appellant's action with costs.

The facts are stated in the judgment of their Lordships.

The judgment of the Court of Appeal was as follows:—

"That it does not appear, from the documents produced by the plaintiff, that he or others have obtained from any authority the exclusive privilege to the use of the mark, Kaisar-i-Hind; whilst, according to the evidence of the above-mentioned Rinaldo Perini,

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at the time he resided in London (from 1866 to about June, 1883), there used to be sold in that city cigarettes with that mark, which is also used for other articles, and which was given as a name to ships.

"That the mark used by the plaintiff has also with it his name, in this form, namely, 'Kaisar-i-Hind cigarettes, manufactured solely by Turnbull, junior, & Somerville, Malta,' and that used by the defendants, 'Kaisar-i-Hind cigarettes, manufactured only by Schembri & Navarro, Malta;' and thus, though the words of Kaisar-i-Hind are to be found in both, still they essentially differ the one from the other in the name of the manufacturer, which, in each of the said trade-marks, appears as expressly added to distinguish the cigarettes of one manufactory from those of the other.

"That, under these circumstances, it cannot be said that defendants have usurped the trade-mark adopted by the plaintiff.

"It decides for the dismissal of the action of the plaintiff, reversing the sentence appealed from, with costs."

James G. Wood, for the appellant, contended that having proved his user of the trade-mark for cigarettes antecedently to the respondents' user thereof, he had made out a title to an exclusive user independently of any grant of an exclusive right from any constituted authority. User of the trade-mark by the respondents in reference to articles other than cigarettes did not prevent their user of the same in reference to cigarettes from being an infringement of the appellant's right. Such user was calculated to deceive the public, and to lead them to believe, contrary to the fact, that such cigarettes were the manufacture of the appellant's firm.

Reference was made to *Wotherspoon* v. *Currie* (1); *Ford* v. *Foster* (2); *Massam* v. *Thorley's Cattle Food Company* (3); *Leathern Cloth Company, Limited* v. *American Leather Cloth Company, Limited* (4), in which Lord Westbury considered that the right to a trade-mark is a right of property which ought to be protected against infringement by injunction.

(1) Law Rep. 5 H. L. 508.
(2) Law Rep. 7 Ch. Ap. 611.
(3) 14 Ch. D. 748.
(4) 4 De G. J. & S. 142; see also in appeal 11 H. L. C. 523.

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD WATSON:—

The appellant Thomas Somerville, as representing his firm of Turnbull, junior, & Somerville, cigarette makers in Malta, in October, 1884, cited the respondents before the Court of Commerce, to shew cause why the property of the trade-mark "Kaisar-i-Hind" should not be assigned to him, in his representative capacity, preferably to the respondents; and why the respondents should not consequently be restrained from using the said mark in their trade, or in any other manner; and also why they should not be condemned in damages, &c., to be assessed by experts.

The appellant's firm had, from and after the month of September, 1879, used these words "Kaisar-i-Hind" to denote a particular class of their cigarettes, which were sold under that name not only in Malta but in the East Indian and Australian markets. Some of these cigarettes had also been exported to and sold in London. The respondents, who are Maltese traders in tobacco, did not dispute that, shortly before the institution of these proceedings, they had begun to use the name "Kaisar-i-Hind" in the course of their trade, as applied to cigarettes which were manufactured by "Schembri & Navarro," or at least to cigarettes which were not the manufacture of "Turnbull, junior, & Somerville." But they maintained in defence to the action, first, that the appellant's firm had not acquired any exclusive right to the name "Kaisar-i-Hind;" and, secondly, that they themselves used the name in such a way that it was impossible for a purchaser to suppose that their cigarettes had been manufactured by the appellant's firm.

In support of the first of these defences the respondents made numerous productions, and also examined one witness, Rinaldo Perini, in order to prove that the name "Kaisar-i-Hind" had, for many years before the date of these proceedings, been extensively used in connection with ships, hats, umbrellas, soap, pickles, &c., as well as cigarettes. Part of that evidence,

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including the testimony of Perini, was adduced after the case had been carried from the Court of Commerce to the First Hall of Her Majesty's Court of Appeal.

The learned judge of the Court of Commerce, on the 18th of November, 1884, decided agreeably to the first prayer of the appellant, with costs, and reserved the decision of the second claim, for damages, until his judgment had become res judicata. The effect of that decision was to affirm the absolute right of "Turnbull, junior, & Somerville" to use the trade-mark "Kaisar-i-Hind" preferably to the respondents, and to restrain the respondents from "using it in their trade, or assuming it in any other manner."

Upon appeal by the respondents, the learned judges of the First Hall reversed the decision of the Court of Commerce, and dismissed the action, as against both respondents, with costs. The leading consideration assigned for their judgment is, "That it does not appear, from the documents produced by the plaintiff, that he or others have obtained from any authority the exclusive privilege to the use of the mark 'Kaisar-i-Hind,' whilst, according to the evidence of the above-named Rinaldo Perini at the time he resided in London (from 1866 to about June, 1883), there used to be sold in that city cigarettes with that mark, which is also used for other articles, and which was given as a name to ships." The learned judges were further of opinion that the trade-marks used by the parties respectively for their cigarettes, although both included the name "Kaisar-i-Hind," were nevertheless essentially different.

Their Lordships are unable to concur in the decision of the Court of Appeal. In Malta there is no law or statute establishing the registration of trade-marks, and no authority exists from whom an exclusive right to a particular trade-mark can be obtained. The rights of the parties to this cause are therefore dependent upon the general principles of the commercial law, some of which are referred to in the judgment of the Court of Commerce. These principles have been very fully illustrated and explained by the House of Lords in the *Leather Cloth Co., Limited* v. *American Leather Cloth Co., Limited* (1); *Wother-*

(1) 11 H. L. C. 538.

spoon v. *Currie* (1); *Johnston & Co.* v. *Orr Ewing & Co.* (2), all of which were cases which arose before the passing of the first British Trades Mark Registration Act in the year 1875.

In the first of these cases, the interest which a merchant or manufacturer has in the trade-mark which he uses was thus defined by Lord Cranworth (3): "The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured." As soon, therefore, as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm; and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-mark belongs. Had it not been for the views expressed by the Court of Appeal in giving judgment, it would hardly have been necessary for their Lordships to observe that the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character; and that such use by others can as little interfere with his acquisition of the right.

In the present case it is beyond dispute that the cigarettes made by the appellant's firm were favourably known in the markets where they were sold, under the appellation of "Kaisar-i-Hind." The use of the term by others as a name for ships, or as a trade-mark for hats, soap, or pickles, could not impede their acquisition of an exclusive right to use it as a trade-mark for their cigarettes. The evidence given by Rinaldo Perini, regarding the use of the term as a trade-mark for cigarettes, does not appear to their Lordships to be sufficient to cut down the appellant's right; it is vague and indefinite both as to time, place, and persons; and it is hardly credible that during the whole

(1) Law Rep. 5 H. L. 508. (2) 7 App. Cas. 219.
(3) 11 H. L. C. pp. 533-34.

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period of his residence in London the name "Kaisar-i-Hind," which had its origin in the proclamation of 1877, following upon the Act 39 Vict. c. 10, should have been in use. Besides, his evidence is at variance with the testimony of Nicholas Cooper Morris, who dealt in cigarettes in London, and must presumably have known what was sold in the London market.

The real question, therefore, comes to be whether the respondents have infringed the appellant's exclusive right; and that question, as Lord Kingsdown said, in the *Leather Cloth Co.'s Case* (1), depends upon "how far the defendants' trade-mark bears such a resemblance to that of the plaintiffs as to be calculated to deceive incautious purchasers." Upon this part of the case their Lordships entertain no doubt. Schembri & Navarro put up their cigarettes for sale in boxes of the same size and shape with those used in their trade by the appellant's firm, and the device on the lid of each box is an exact copy of that firm's label, with one or two colourable variations. Whilst retaining all the essential features of the label, the respondents have introduced certain differentiæ which may very fairly be described in the language used by Lord Blackburn in *Johnson & Co.* v. *Orr Ewing & Co.* (2): "These are differences which might prevent purchasers being deceived. I do not think they are such as to prevent its being likely that they would be deceived." In that state of the facts, it is not necessary to the appellant's success that the respondents should have intended to mislead; but their Lordships agree with the Judge of the Court of Commerce in thinking that it is impossible to acquit them of that intention.

It appears to their Lordships that the decree of the Court of Commerce is couched in terms somewhat too wide, and that it ought to have been confined to an injunction such as the English Courts were in use to grant in similar cases. Their Lordships will accordingly advise Her Majesty to reverse the judgment of the Court of Appeal, and also to reverse the judgment of the Court of Commerce, except in so far as it reserves the decision of the appellant's second claim; and to restrain the respondents or either of them from using the label or device upon the lid of Schembri & Navarro's boxes produced in process, and

(1) 11 H. L. C. 539. (2) 7 App. Cas. 230.

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referred to in the judgment of the Court of Commerce, or any similar label or device, and also from using the name or trade-mark "Kaisar-i-Hind" in connection with any cigarettes other than those manufactured by the appellant's firm, so as to represent or induce the belief that any such cigarettes were manufactured by the said firm. Their Lordships will also advise Her Majesty that the respondent Paolo Schembri, who, as representing his firm of Schembri & Navarro, appears to have taken the leading part in this litigation, ought to pay the costs of the appellant in both Courts below. The same respondent must pay the costs of this appeal.

Solicitors for appellant: *W. & J. Flower & Nussey.*

[PRIVY COUNCIL.]

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In re ABRAHAM MALLORY DILLET.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Practice—Criminal Proceedings—Conviction set aside—Order striking off the Roll reversed—Grounds for granting special Leave to appeal.

In an appeal by a barrister and solicitor against a verdict convicting him of perjury, and against a consequential order of Court directing him to be struck off the roll of practitioners:—

Held, that the conviction having been obtained by directions of the judge which were improper and grievously unjust to the appellant, could not be allowed to stand, and that the consequential order must be reversed.

Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

Falkland Islands Company v. *The Queen* (1 Moore P. C. (N.S.) 312) approved.

Special leave was granted to appeal against the conviction, limited to shew that being the sole foundation for the subsequent order, it had been obtained so unfairly as not to be conclusive for that purpose.

THIS was an appeal by special leave to reverse a conviction (Sept. 6, 1884) for alleged perjury, and to annul an order of the

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Supreme Court (March 27, 1885) striking the petitioner off the rolls of that Court.

The petition for special leave stated the facts as they appear in this report, and alleged thirteen grounds for granting the relief prayed. The thirteenth was "that the Chief Justice in his charge to the jury made statements of alleged facts with reference to the petitioner's conduct on previous and other occasions, of which no evidence had been given at the trial, and which were highly detrimental to the petitioner's character, and calculated to prejudice the minds of the jury against him. In particular the Chief Justice made the observations to the jury marked A, B, and C. There was no evidence before the jury as to the matters commented upon in the extracts A and B."

Those extracts are as follows :—

A. "As allusions have been made in the affidavits and elsewhere to previous cases of contempt in which Mr. A. M. Dillet was concerned, it was right they should know what these cases were, and it was enough to say that the first time he had had to take notice of Mr. Dillet's conduct was when he (Mr. D.) was engaged in editing the *Belize Advertiser*. He (the Chief Justice) had made an order in the case of Maximo Carrillo to sell real property, coupled with certain stipulations to be observed when the property should be put up for sale. Mr. Dillet became the purchaser of the property. But as the stipulations of sale had not been complied with, he (the Chief Justice) cancelled the sale. The next issue of the *Belize Advertiser* warned the public from buying it, thus damaging the sale. What punishment did the Court give him? He placed himself (at the suggestion of the Court) unreservedly in the hands of the Court, and nothing was done to him; Mr. Parker, the counsel moving against Mr. Dillet, foregoing all costs in the case. 2nd. Mr. Dillet having a suit himself pending, in which he (Mr. Dillet) was plaintiff and Mr. Henry Trumbach the defendant, plaintiff came to his (the Chief Justice's) house and brought with him certain papers, demanding an order of the judge. He had ruled, before this, that all business communications to him were to be sent through the clerk of courts. He therefore declined to see him. Mr. Dillet then wrote him an offensive letter. Mr. Dillet was again brought

before the Court. On Mr. Dillet making an affidavit admitting that he had been guilty of a contempt, he got off without any punishment. Mr. Goodman was not then in the colony."

B. "With respect to witnesses to character, if Mr. Dillet had lived at a distance, if he had lived many years out of Belize, he (the Chief Justice) could understand his calling witnesses to character. But then, as he has told the jury, they all know him. Gentlemen, if he says you know him, why call witnesses to character? It may be that you can say of him, though I myself cannot tell, whether he has been a dutiful son, the joy of a mother's heart, the support of a father in his declining years; whether he has been a loyal and staunch husband, a reliable and trusty friend, or whether his name has been mixed up with any tragical or dark transaction. But he (the Chief Justice) begged them to wipe out of their minds what they knew in him to be base, low, and disgraceful, give him all benefit of the good, and try him simply on the evidence before them."

C. "Mr. Dillet tells Mr. Bristowe (according to the former) that he is not coming. He then comes late and says, 'You are asking leading questions.' It was natural for the Attorney-General to say, 'What business is it of yours?' If Mr. Bristowe gave him cause of offence, is that sufficient cause to write such a letter to the Attorney-General? You, gentlemen, are there to stand between the Crown and Mr. Dillet at this his trial. Pause for a second and reflect what the result would be of a verdict in favour of Mr. Dillet. It would be to brand the Attorney-General of the colony, a magistrate, and others, as perjurers; and are you going to brand all the members of my bar as alike perjurers and conspirators? If the jury think so, let them do their duty regardless of consequences."

On the 11th of July, 1885,* the appellant appeared in person in support of his petition, and in accordance with the decision of their Lordships his petition and the above extracts were referred to the Chief Justice in order that he might make such observations thereon as he might think fit, with liberty to appear by

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his counsel at the bar to shew cause against the prayer of the petitioner.

The Chief Justice thereupon made his observations in writing, the nature of which sufficiently appears in their Lordships' judgments.

On the 20th of March, 1886, the case came again before their Lordships, the appellant appearing in person in support of his petition for special leave to appeal, and the following judgment, granting such leave, was delivered by

Lord Blackburn*:—

This is a petition for special leave to appeal in a case of rather an unusual kind; and it requires some statement to make the case intelligible.

By an order of the Supreme Court of British Honduras, made in the matter of Abraham Mallory Dillet, a solicitor of the Supreme Court, on the 23rd of June, 1884, it was ordered that the said Abraham Mallory Dillet should on Monday, 30th of June, 1884, appear and answer upon oath the various matters set forth in the affidavits of William Meigh Goodman, Thomas Graham, and Richard Cato, in the said matter respectively duly filed.

These affidavits related to the conduct of Abraham Mallory Dillet on the 17th of June, 1884. In substance they disclosed that Mr. Graham was, on the 17th of June, 1884, sitting as judge of a petty Debtors Damages Court. The sitting had begun at 11 A.M.

Mr. Goodman, who was Attorney-General for the Colony, was conducting a case before Mr. Graham, and was opposed by Mr. Bristowe, a solicitor. When Mr. A. M. Dillet came into Court, Mr. Graham, in his affidavit, says, "I noticed that Mr. A. M. Dillet was apparently under the influence of drink." Mr. Dillet interfered, and "after some words with Mr. Goodman, objected to Mr. Goodman asking leading questions and called my attention." He states that, after some discussion as to whether Mr. Dillet was retained or not, Mr. Dillet left the Court.

* *Present:*—Lord Blackburn, Lord Monkswell, Lord Hobhouse, and Sir Richard Couch.

Mr. Graham further says, "Mr. A. M. Dillet's conduct and demeanour throughout were unbecoming a solicitor and professional man, and appearing as he did under the influence of drink, his temper seemed to be excited and uncontrollable, so that I, as judge of the Court, had more than once to call him to order, and twice I got up from the bench and threatened to adjourn the Court."

The Court was, in the ordinary course, adjourned from twelve to three o'clock. After it resumed Mr. Graham saw Mr. A. Dillet come into Court with a whip in his hand and take his seat opposite Mr. Goodman. But, apparently on the persuasion of Mr. Bristowe, he left the Court.

Mr. Goodman in his affidavit gives nearly the same account of what passed in Court as that given by Mr. Graham; and states that on his leaving Court at twelve o'clock and going to his own chambers he found a note in Mr. Dillet's handwriting addressed to him. It was in the following terms:—

"Sir, you are an impertinent fellow. If you continue your rudeness by me I shall thrash you.

"Your obedient servant,

"A. M. DILLET."

Richard Cato, the crier of the Court, in his affidavit states that about 2.30 P.M. on the 17th of June, 1884, Mr. A. M. Dillet came to him. He says, "I saw Mr. A. M. Dillet was intoxicated and had a riding whip in his hand. He then said to me, 'Cato, I want you to take a message to the Attorney-General. Tell him, with my compliments, I wish to see him.'"

Cato brought back the answer that Mr. Goodman would not see Mr. Dillet, and Cato swears that Mr. Dillet then said, "He does not wish to see me. I want to thrash him, and if he comes here I will thrash his damned hide."

It seems obvious that on such affidavits the Supreme Court had jurisdiction to order Mr. Dillet, a solicitor, and as such the officer of the Court, to answer the matters in them, and on hearing his answers to adjudicate on the conduct of the solicitor.

A. M. Dillet made a long affidavit. It has been now returned from the colony and is to be found in the record.

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It contains many statements in the technical sense of the word impertinent, and does not in any way improve his position. It is difficult to doubt that on those affidavits the Supreme Court might, if they had adjudicated on them, have properly come to the conclusion that A. M. Dillet had been guilty of misconduct as a solicitor, and passed such a sentence as would be adequate to that misconduct.

But that course was not taken. The Attorney-General filed an information containing one count, charging A. M. Dillet with perjury in having sworn, in answer to the affidavits of Goodman and Graham stating that he appeared under the influence of drink, "I positively say I was not so."

And a second count imputing perjury in swearing "As to the affidavit of the aforesaid Richard Cato, I deny that I was intoxicated as alleged."

The information was tried before the Chief Justice, and after a long trial the jury, on the 6th of September, 1884, returned a verdict of guilty, and sentence of six months' imprisonment was pronounced.

After the imprisonment had been undergone, the following order was made:—

"In the Supreme Court of British Honduras, 1885.

"In the matter of Abraham Mallory Dillet, a solicitor of this Honourable Court.

"Upon the motion of Frederick Hardyman Parker, acting Attorney-General of British Honduras, and upon reading the affidavit by him made and filed herein, it is ordered that the said acting Attorney-General have leave to serve Abraham Mallory Dillet, a solicitor of this Court, with notice of motion for 11 A.M. 27th March instant, before this Honourable Court for an immediate order absolute that the said Abraham Mallory Dillet be struck off the roll of practitioners of this said Court as a solicitor thereof, on the ground that the said Abraham Mallory Dillet was tried and convicted of a misdemeanour, to wit, of perjury at the sittings of this Honourable Court for criminal business, August term, 1884, and was thereupon sentenced and committed to six months' imprisonment in the gaol of Belize; and that the said Abraham Mallory Dillet do pay the costs of and incidental to

this application and the proceedings consequent thereon. Dated at Belize, this 26th March, 1885. By order."

The affidavit consisted only of a verification of the certificate of the conviction.

Mr. Dillet, in an affidavit sworn on the 27th of March admitted personal service on him of a notice on the 26th day of March, about 1 P.M., and stated that he verily believed the whole proceedings from beginning to end in the matter of his trial for perjury were contrary to law.

He, before this Board, verbally stated to their Lordships that he was in Court on the 27th of March and heard the Chief Justice make the order as moved for, but having sailed for England on the ensuing day never saw the formal order.

It was solely on this ground that the order proceeded; there never has been any adjudication on the order to answer the matters in the affidavits.

A conviction for a grave offence is a ground for justifying the conclusion that the person convicted is not a proper person to be a solicitor. See *Ex parte Brounsall* (1); *In re King* (2).

No appeal against the striking the petitioner off the rolls can be of use, unless it is open on it to the appellant to shew that the conviction was obtained in such a manner that it ought not to have this effect against him.

When this petition was before this Committee in 1885, they reported to Her Majesty as their opinion that the petition, together with certain extracts from the charge of the Chief Justice as reported in the *Colonial Guardian*, should be referred to the Chief Justice of Honduras, in order that he might make such observations on the petition and the allegations contained as he may think fit, and that His Honour the Chief Justice ought to be directed to return such observations to the Registrar of the Privy Council, in order that the same may be laid before this Board and considered by their Lordships.

These have now been returned.

After considering them, their Lordships think, that there is ground for inquiry as to whether the Chief Justice did not, more especially if he spoke to the purport stated in the extracts B and

(1) 2 Cowp. 829. (2) 8 Q. B. 129.

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C, even after giving effect to his observations, obtain the verdict of the jury in such a way that it ought not to be considered satisfactory and conclusive against the petitioner, in which case the order striking him off the rolls on the ground on which alone it was made should not stand.

In *Falkland Islands Co.* v. *The Queen* (1), it is said, "it may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended by success."

In this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of the 27th of March, 1885.

Their Lordships do not think that the petitioner has made out any one of the first twelve grounds of objection stated in his petition, and they do not advise that he should be allowed to appeal on any of those twelve grounds. Nor are they to be taken as considering it as established that the summing-up of the Chief Justice really was as reported in the *Colonial Guardian*. But they think, after considering the observations of the Chief Justice, Mr. Dillet ought to be permitted on appeal to shew, if he can, that on the grounds stated in his thirteenth reason the conviction was obtained in a manner so unsatisfactory that the conviction alone ought not to be conclusive as a ground for striking him off the rolls.

Their Lordships will humbly advise Her Majesty that the petitioner be at liberty to appeal against the order of the 27th of March, 1885, striking him off the roll, and also to the extent above stated, and no further, against the conviction for perjury.

Thereafter on the 10th of March, 1887, the appeal came on for hearing and final disposal.

(1) 1 Moore P. C. (N.S.) 312.

R. O. B. Lane (*Willis*, Q.C., with him), for the appellant.

March 19. The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is brought by Abraham Mallory Dillet, of the Inner Temple, barrister-at-law, against a verdict returned by a jury, on the 6th of September, 1884, finding him guilty of the crime of perjury before William Anthony Musgrave Sheriff, who was at that time Chief Justice of the Supreme Court of British Honduras; and also against a consequential order of the Chief Justice, dated the 27th of March, 1885, directing the appellant to be struck off the list of practitioners of that Court. Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

Along with his petition for leave to appeal, the appellant produced a printed report of the charge of the presiding judge, and, inter alia, alleged (Reason XIII.) that the judge had made statements to the jury with reference to his conduct on other occasions, of which no evidence had been given at the trial; and he referred in particular to three extracts from the charge, marked respectively A, B, and C, as calculated to prejudice unduly the minds of the jury against him. By Order in Council of the 12th of August, 1885, Her Majesty directed the petition and these extracts to be referred to the Chief Justice, in order that he might make such observations thereon as he might think fit, and further ordered that he should be at liberty to appear and shew cause against the prayer of the petitioner. His Honour did not avail himself of the leave thus given him, but forwarded his observations to the Registrar of the Privy Council. These observations were submitted to this Board; and upon their report Her Majesty, by Order in Council of the 3rd of April, 1886, allowed the appellant to enter and prosecute his appeal upon the ground stated in the thirteenth reason of his petition, namely, that the

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conviction was obtained in a manner so unsatisfactory that the conviction alone ought not to be conclusive as a ground for striking him off the roll. The Chief Justice was duly served with the appeal, but has not made appearance.

The prosecution of the appellant for perjury had its origin in these circumstances. The Chief Justice received a communication from Mr. Goodman, the Attorney-General of Honduras, bringing under his notice the conduct of the appellant in the Inferior Court at two sittings of the Court held upon the 17th of June, 1884, and in the presence of the acting magistrate. His Honour thereupon directed the affidavits of three persons who were present on these occasions to be prepared and submitted to him for his approval, and these were subsequently sworn to by the deponents. Two of them (the Attorney-General and the acting magistrate) stated that the appellant "appeared to be under the influence of drink;" the third (Cato, the Court crier), "I saw that he was intoxicated." The Chief Justice appointed the appellant to answer these affidavits, and he accordingly made an affidavit, in which he stated that he was not "under the influence of drink," and denied Cato's statement that he was intoxicated. Upon consideration of these statements in his affidavit, the Chief Justice, acting under the authority of 14 & 15 Vict. c. 100, which has been extended to Honduras, directed the Attorney-General to prosecute the appellant for perjury; and a criminal information was filed by that officer on the 15th of August, 1884, containing two counts, one founded upon the appellant's contradiction of himself and the magistrate, and the other upon his contradiction of Cato's statement. The trial commenced upon the 27th of August, 1884, and, after occupying eight days, terminated in a verdict of guilty by a majority of five to two, accompanied by a recommendation to the sympathy of the Court.

It is very unfortunate that, owing to the fact of there being but one member of the Supreme Court of British Honduras, the trial took place before the same Judge who had directed the affidavits to be prepared and submitted to him, had appointed the appellant to answer them, and, upon the affidavit and answer being made, had directed the prosecution. These circumstances may in some measure account for, although they cannot, in the

opinion of their Lordships, justify, many of the observations which were addressed by him to the jury.

The issue which the jury had to try was a very simple one. They had to consider, in the first place, whether the accused was under the influence of liquor on the occasions libelled; and, in the second place, whether he knew and believed that he was so at the time when he made affidavit to the contrary. Unless they were satisfied on both these points, the jury had no right to find the appellant guilty. A man labouring under excitement may appear to others to be under the influence of drink when he is not; and, although he is actually under that influence, he may be unconscious of the fact. The only question submitted to the jury was, whether the appellant's behaviour in Court on the 17th of June, 1884, was due to drink. A misdirection of that kind would not necessarily afford a ground for setting aside a conviction in a criminal case. But, in the extract C, which the Chief Justice in his observations states to be "substantially correct," he thus put the case against the accused:—"Pause for a second and reflect what the result would be of a verdict in favour of Mr. Dillet. It would be to brand the Attorney-General of the colony, a magistrate, and others as perjurers, and are you going to brand all the members of my bar as alike perjurers and conspirators? If the jury think so, let them do their duty regardless of consequences." Comment upon that language is needless. It grossly misrepresented the real issue, and was most unfair to the accused, whose acquittal by the jury would have cast no imputation of perjury, or even of untruthfulness, either upon the officials alluded to or upon the members of the Honduras bar.

The Chief Justice does not in his observations impeach the substantial accuracy of the extract A, which is sufficiently vouched by the affidavits produced, but he vindicates the remarks contained in that extract by pointing out that the records in the four cases therein referred to were put in evidence by the prosecutor before the case was closed, and that the appellant was the first to refer to these cases of contempt. Apparently, the Chief Justice has failed to appreciate the gravamen of the objections which the appellant takes to the remarks in question, which are, in their Lordships' opinion, well founded. The Judge not only

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uses these records in a manner altogether unwarrantable, but he converts himself into a witness, and without being sworn makes statements to the jury regarding a visit of the accused to his (the Chief Justice's) private house, and other matters, which are neither to be found in these records nor in the evidence.

The remarks contained in extract B are a little, but not much, less objectionable. Their Lordships have not, in estimating their character, taken into account a reference which is therein made to a certain "tragical or dark transaction." The Chief Justice, in his observations, states that he has no recollection of making, and is under the impression that he did not make, such a reference, and their Lordships have assumed, for the purposes of this appeal, that he did not do so; although there are affidavits produced by persons who heard the words, including one reverend gentleman who took them down in shorthand at the time they were uttered to the jury.

It would be neither pleasant nor profitable to criticise more minutely the directions of the Chief Justice to the jury, so far as contained in these extracts. Their Lordships are of opinion that these directions were grievously unjust to the appellant, and in many instances outraged the proprieties of judicial procedure. A conviction obtained by such unworthy means cannot be permitted to stand; and their Lordships will humbly advise Her Majesty to set aside the verdict and conviction appealed from. Seeing that the appellant has already undergone the sentence which followed upon the verdict, it is unnecessary to order a new trial. Their Lordships will also humbly advise Her Majesty to reverse the order of the 27th of March, 1885, removing the appellant from the roll of practitioners of the Supreme Court of British Honduras. Their Lordships will direct a copy of their judgment in this case to be communicated to one of Her Majesty's Secretaries of State.

[HOUSE OF LORDS.]

ALFRED BENTLEY . . . . . APPELLANT;

AND

EDOUARD VILMONT . . . . . RESPONDENT.

H. L. (E.)
1887
Aug. 5.

Sale of Goods—Contract induced by False Pretences—Revesting of Property in Original Owner upon Conviction—Sale in Market Overt—Purchaser in Market Overt without Notice of Fraud—Order for Restitution—24 & 25 Vict. c. 96, s. 100.

The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution :—

Held, affirming the decision of the Court of Appeal (18 Q. B. D. 322), that under 24 & 25 Vict. c. 96 s. 100 the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser.

Moyce v. *Newington* (4 Q. B. D. 32) overruled.

APPEAL from a decision of the Court of Appeal (1).

In March 1885 Galpin & Crochard in France made a contract for the sale of goods to certain persons named Klein & Hodder. This contract was obtained by false pretences by the Kleins and Hodder. The goods were sent to Hodder in England and were deposited with Starbuck in the city of London. In May the goods while so deposited and exposed for sale in Starbuck's shop were bought by the appellant Bentley in market overt without notice of the fraud.

After the sale to Bentley the Kleins & Hodder on the prosecution of Galpin & Crochard were convicted at the Old Bailey before the Common Serjeant of obtaining the goods by false pretences. The Common Serjeant refused an application made on behalf of the prosecutors for an order for restitution of the goods.

The goods having been claimed both by Galpin & Crochard

(1) 18 Q. B. D. 322.

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and by Bentley, Starbuck, in whose possession the goods had remained, interpleaded, and an issue was directed to try the title to the goods, Vilmont (as trustee in the liquidation of Galpin & Crochard) being the plaintiff, and Bentley the defendant. This issue was tried before Denman J. without a jury, and that learned judge gave judgment for Bentle yon the authority of *Moyce* v. *Newington* (1).

The Court of Appeal (Lord Esher M.R. Lindley and Lopes LJJ.) reversed this decision and entered judgment for Vilmont (2). Against this judgment Bentley appealed.

July 11, 18, 19. Sir *R. Webster* A.G. and *Jelf* Q.C. (*W. A. Attenborough* with them) for the appellant:—

It must be taken that the goods were obtained from Galpin & Crochard the original owners by a bargain of sale which was voidable because procured by false pretences, but not void. Two questions then arise: first whether 24 & 25 Vict. c. 96 s. 100 (3) applies where the original owner has been induced to part with

(1) 4 Q. B. D. 32.

(2) 18 Q. B. D. 322.

(3) 24 & 25 Vict. c. 96 s. 100: "If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been bonâ fide paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been bonâ fide taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods, or documents of title to goods, for any misdemeanor against this Act."

the goods by a contract voidable but not void; secondly whether it applies where the goods have been bought in market overt by a purchaser without notice of the fraud.

The appellant relies upon each of those positions and contends that in neither case does the statute apply. The statute was never intended to affect the rights of third parties, per Williams J. in *Chichester* v. *Hill* (1). The words in sect. 100 "the owner of the property" mean the owner whose property has never been divested either by a voidable contract of sale or by a sale in market overt. "Property" is defined by sect. 1 to include "not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." If this definition is read into sect. 100 it affords a strong argument for the appellant. The legislature cannot have intended the prosecutor to have both properties. Both provisoes in sect. 100 also strongly support the appellant's contention. It is argued that sect. 100 was intended to furnish a reward for prosecuting offenders, but it cannot have been meant that the reward should come out of the pockets of a bonâ fide purchaser. The section was only passed to give additional means of enforcing existing rights, to give a summary remedy to the person who is the owner.

Apart from the statute it will not be denied that the respondent has no claim. The contract being voidable at election and not void, and the original owner having done nothing to avoid the contract before the sale to a bonâ fide purchaser, he could not afterwards avoid it at common law: *White* v. *Garden* (2). There is nothing in the statute to shew an intention to affect cases of voidable contract. As for the authorities, *Moyce* v. *Newington* (3) is a direct decision in point. In *Lindsay* v. *Cundy* (4) the decisions of the Court of Appeal and the House of Lords do not touch the present point, but the observations of Lord Cairns are in favour of the appellant. *Scattergood* v. *Sylvester* (5) was a

(1) 52 L. J. (Q.B.) 160, 162.
(2) 10 C. B. 919.
(3) 4 Q. B. D. 32.
(4) 2 Q. B. D. 96; 3 App. Cas. 459, 464.
(5) 15 Q. B. 506.

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case of stolen goods and has no bearing on the present case of a voidable contract. Where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the party to commit the fraud, e.g. as in the present case by voluntarily parting with the goods: *Babcock* v. *Lawson* (1) per Cockburn C.J. approving *Moyce* v. *Newington* (2).

[They also referred to *Horwood* v. *Smith* (3); *Reg.* v. *Stancliffe* (4); and *Reg* v. *Kenrick* (5).

Arthur Charles Q.C. (*C. W. Mathews* with him) for the respondent:—

Apart from statute and before 21 Hen. 8 c. 11 the owner of stolen goods was entitled to have them restored to him, even by a purchaser in market overt, who could not recover the price he had paid; 2 Bracton (ed. Sir T. Twiss) pp. 513–517. The procedure was by "appeal"; 2 Bracton p. 511. There are other authorities to the same effect; Staundforde's Pleas of the Crown art. "Fresh Suit" pp. 165, 167; 1 Britton (ed. Nichols) p. 59; Glanvil (transl. Beames) p. 272; Fleta p. 55 c. 38. Then came 21 Hen. 8 c. 11, giving to the owner of stolen goods restoration upon indictment of the felons, and Lord Coke says, referring to the statute: "So as in this case also the party robbed, or owner shall have restitution, notwithstanding any sale in market overt (6)." See also 1 Hale, Pleas of the Crown, 540; Hawkins, Pleas of the Crown bk. 2 ch. 23 s. 54; 4 Blackstone Com. (ed. Christian) p. 363. Then came *Golightly* v. *Reynolds* (7), where it was held that under 21 Hen. 8 c. 11 the original owner could bring trover for the goods after conviction, Lord Mansfield saying, "The statute puts an indictment in the same case as a writ of appeal. The statute says it shall be restored; but leaves the party to his own way of recovery. Since this statute, it gives him a particular remedy, but does not take away his other remedy. I don't believe there has been a writ of restitution these two hundred years." Then came *Horwood* v. *Smith* (8), where it

(1) 4 Q. B. D. 394, 400.
(2) 4 Q. B. D. 32.
(3) 2 T. R. 750.
(4) 11 Cox, C. C. 318.
(5) 5 Q. B. 49.
(6) 2 Inst. 714.
(7) Lofft, 88, 90.
(8) 2 T. R. 750.

was held that the owner of stolen goods could not maintain trover against the defendant who had purchased them in market overt, because the defendant had sold them again before the thief was convicted and therefore before the property had revested in the plaintiff. Then came 7 & 8 Geo. 4 c. 29 ss. 53, 57, making restitution apply to the offence of obtaining by false pretences as well as by stealing, and on this statute it was held that the property in a stolen chattel revests in the owner on conviction and the owner may maintain trover, though there has been no order for restitution: *Scattergood* v. *Sylvester* (1). Then came 24 & 25 Vict. c. 96 s. 100. Words which are effectual to revest goods stolen and sold in market overt are equally effectual where the goods have been obtained by false pretences. The statute contains no words making any distinction between the two cases. It does indeed provide for certain cases where restitution is not to be made, but the present is not among them. The Court which tries the prisoner has no doubt jurisdiction to refuse to make an order for restitution, and will exercise it in certain cases: e.g. as in *Reg.* v. *Ford* (2) on the ground that the person against whom the order would have to be made had not been called as a witness, in other words was not before the Court. The sale in market overt does not affect the jurisdiction of the judge to order restitution: *Reg.* v. *Horan* (3). To bring the case within s. 100 of 24 & 25 Vict. c. 96 it matters not what the nature of the false pretences were, whether by a voidable contract or not: it is enough for the present case that the conviction was under s. 88. There is no authority against the respondent's contention except *Moyce* v. *Newington* (4), and there the judgment went upon an entire misunderstanding of *Horwood* v. *Smith* (5), and *Lindsay* v. *Cundy* (6) in the Queen's Bench Division. The reasoning of Blackburn and Lush JJ. in the latter case, which like the present was one of obtaining goods by false pretences under a voidable contract, shews that their judgment would have been in favour of the original owner in the present case, and that reasoning was untouched by the decisions of the Court of

(1) 15 Q. B. 506.
(2) 11 Cox, C. C. 320.
(3) 6 Ir. Rep. Com. Law, 293.
(4) 4 Q. B. D. 32.
(5) 2 T. R. 750.
(6) 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Cas. 459.

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Appeal and of the House of Lords, which went upon another ground.

Sir *R. Webster* A.G. in reply:—

The authorities cited contrà do not touch the cardinal distinction between the case where the goods are stolen from the owner against his will and he does no voluntary act, and the case where the owner voluntarily parts with the possession of and the property in the goods, induced by a contract voidable but not void. The statute cannot have intended to revest the property in an owner for instance who has received money under such a voidable contract and never has avoided it but has prosecuted the fraudulent person to conviction. The statute was only intended to deal with transfers effected entirely by the act of the thief. So far as is known no restitution of goods has ever been ordered in the case of a voidable contract.

The House took time for consideration.

Aug. 5. LORD WATSON:—

My Lords, in this case I have come, with very great reluctance, to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

The respondent parted with his goods under a voluntary contract of sale, which had the effect of vesting the property of the goods in the purchasers, Klein & Co. It now appears that the sale was induced by fraud, a circumstance which gives the seller the option either of adhering to his bargain or of rescinding it in a question with the fraudulent purchaser. The individual partners trading, or professing to trade, under the firm of Klein & Co. have been convicted, at the instance of the original owners, of the statutory misdemeanor of obtaining the goods sold to them by fraudulent pretences. Before the prosecution was instituted, and before he had any notice that the goods had been fraudulently obtained, the appellant purchased them in good faith for an adequate price, paid the purchase-money and obtained delivery. In these circumstances the respondent sues the appellant, under sect. 100 of the Act 24 & 25 Vict. c. 96 for restitution of

the goods, which still remained in the possession of the appellant at the time when this action was raised.

I do not think that, apart from statute law, a bonâ fide purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud stands in precisely the same relation to the original owner as a purchaser of stolen goods, without notice of the theft, in market overt. In the latter case the original owner and the purchaser in open market are to this extent in pari casu, that neither has done aught to mislead the other; whilst in the former case the original owner has intentionally given his fraudulent vendor an ex facie absolute and valid title to the goods, upon which purchasers without notice of the fraud are entitled to rely. I have great difficulty in supposing that the legislature, as an incentive to the prosecution of crime, deliberately intended in the case where the property has been passed by the act of the original owner to deprive the honest purchaser both of his goods and of his money; but I have been unable to put a reasonable construction upon the language of sect. 100 which will avoid that inequitable result.

Sect. 100 enacts that if any person guilty of any felony or misdemeanor in "stealing" or "in obtaining" a chattel or other property shall be indicted of such offence by or on behalf of the "owner of the property" and convicted thereof, "in such case the property shall be restored to the owner or his representative." That enactment enables an owner who has brought himself within the provisions of the clause to sue for recovery of his property. It has been settled by a long series of authorities, under successive statutory enactments, of which 24 & 25 Vict. c. 96 s. 100 is the last, that the former owner of goods which were stolen from him, upon his prosecuting the thief to conviction becomes entitled to recover the goods from a bonâ fide purchaser who has paid a full price in open market. To my mind these authorities are not reconcilable with any construction of the clause which does not attach to the expression "owner of the property" the same meaning as if it had been "the original owner of the property," or which does not attach the same meaning to the words "the property shall be restored to the owner," as if they had run thus: "the property shall revest in and shall

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be restored to the original owner." These expressions must, in my opinion, have the same force and must be similarly construed in the case of conviction for fraudulently obtaining goods as in the case of conviction for theft. The language of the clause leaves no room for making any distinction between goods obtained by fraudulent pretences without the property passing, and goods obtained by the same means under a voidable contract of sale; and it is for these reasons that I am constrained to hold that the respondent must prevail.

Upon two recent authorities cited at the bar I have these observations to make. In *Lindsay* v. *Cundy* (1) one Blenkarn had been convicted of obtaining goods from the prosecutor by false pretences, but the defendants had purchased the goods from Blenkarn, and had resold them before his conviction. The judges of the Queen's Bench were of opinion (2) that there was a voidable contract of sale which passed the property of the goods to Blenkarn; and they gave judgment for the defendant on the authority of *Horwood* v. *Smith* (3), in respect that the statute did not re-vest the property in the prosecutor until conviction, and that his statutory title did not relate back to the date of the original fraud. Lord Blackburn treated the case of purchase of stolen property from a thief in market overt as on all fours with that of purchase from a seller who has a title of property under a contract voidable on the ground of his own fraud. His Lordship said, "When did the plaintiffs' property begin, that is to say, begin after the time the defendants had got the goods, in this case? Not till after the conviction of the person guilty of the fraud, because before that time the property had been altered by a bonâ fide purchase from a person who held it under a voidable but not void contract. Altering these few words everything in the judgment of Buller J. (i.e. in *Horwood* v. *Smith* (3)) is applicable to the present case." A different view was taken of the true character of the original transaction both in the Court of Appeal and in this House (4). It was held that there was no contract, and that the property did not pass; and upon that footing, the sale to them

(1) 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Cas. 459.
(2) 1 Q. B. D. 348, 357.
(3) 2 T. R. 750.
(4) 2 Q. B. D. 96; 3 App. Cas. 459.

not having been in market overt, the defendants were made liable for the conversion of the goods before conviction. No observations were made, either by the Lords Justices or by the noble and learned Lords who decided the case here, upon the effect of the Act of 1861, and their judgments do not impair the authority of the views expressed upon that point in the Court of Queen's Bench.

The later case of *Moyce* v. *Newington* (1) would if well decided be conclusive in favour of the appellant. I think the defendant in that case did commit a legal wrong in taking the sheep brevi manû out of the possession of the plaintiff before he had obtained the conviction of his fraudulent vendee. It was held however that sect. 100 does not give the original owner who parted with his property under a contract of sale induced by fraud the right to demand restitution from a bonâ fide purchaser who was in possession at the time of the conviction. I regret having to dissent from that construction of the clause; but I cannot say that I have any hesitation in dissenting from the reasons assigned for it by the late Lord Chief Justice, which appear to me to be derived from an entire misapprehension of what was decided by the Court of Exchequer in *Horwood* v. *Smith* (2) and by the Court of Queen's Bench in *Lindsay* v. *Cundy* (3).

I am therefore of opinion that the order appealed from ought to be affirmed, and the appeal dismissed with costs, and I move accordingly.

LORD BRAMWELL:—

My Lords, I agree in the reasoning and conclusion of my noble and learned friend (Lord Watson). I agree also in his regret that our decision must be as it is, and in his remark that he does not think the legislature could have so intended.

It is manifest from the old authorities, Glanvil, Fleta, the Mirror, and others, cited by Mr. Charles, that in the case of stolen goods the plaintiff in a proceeding by appeal in which he established the theft was entitled to a restitution of stolen goods, though they had been sold in market overt. That indeed

(1) 4 Q. B. D. 32. (2) 2 T. R. 750.
(3) 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Cas. 459.

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changed the property, but that property was restored on the success of the proceeding. It cannot be doubted that the statute of Henry VIII. was intended to have the same effect and consequences. This is shewn by the reason of the thing and the authorities, and indeed was admitted by the Attorney-General. If this then were a case of stolen goods, the plaintiff's right could not be contested. But it is a case not of stolen goods, but of goods obtained under a contract itself obtained by fraud and voidable. The question could not arise under the statute of Henry VIII. but it can now. To hold that the cases differ would be to hold that the same words in the same place are to have different meanings as to different things. That cannot be.

The authorities are all one way and against the defendant except *Moyce* v. *Newington* (1). That case was wrongly decided on a mistake as to the effect of *Lindsay* v. *Cundy* (2). The law is that on conviction the property revests. Until then it is not in the original owner if it has been sold in market overt or sold by a fraudulent purchaser to a bonâ fide purchaser from him.

LORD FITZGERALD :—

My Lords, it seems to me unfortunate that we have not the facts before us as to the alleged contract between the claimants (Galpin and Crochard) and Hodder or Hodder and Klein, and as to what was the character of the false pretence by which the alleged bargain was rendered voidable. The only statement we have of the facts is to be collected from the judgment of Denman J.: "Between January and March 1885 Hodder obtained some goods from Galpin and Crochard which we must take to have been obtained by false pretences, so that there was an obtaining of them as far as appears by some bargain or other which was a bargain which might have been avoided, but there was an obtaining of them. Between March and May the goods had been pawned by this man Hodder who had so obtained them with a person of the name of Dobree, a pawnbroker, and Dobree not, I suppose, having premises of his own to store them in, stored them at the premises of a man named Starbuck."

The goods may have been obtained by falsehood on the part of

(1) 4 Q. B. D. 32. (2) 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Cas. 459.

the supposed vendee which would lead to the conclusion that there never had been any contract of sale. The additional matters of fact are succinctly stated in the report (1), but I need not further advert to the particulars, for it seemed agreed by the parties on the argument that your Lordships should dispose of the appeal on the basis that there had been a contract under which the property in the goods in question passed to the vendee (Hodder), but under such circumstances that the bargain was so vitiated by the false pretences of the vendee as to render it voidable at the option of the vendor.

We must however go further and assume that the false pretence of Hodder was of some existing material fact false to his knowledge, by which he obtained not only the bargain but the possession of the goods. Hodder having got possession of the goods (merinoes and cashmeres), pawned them with Dobree, but when exactly or under what circumstances does not appear, and Dobree sent them to be finished and exposed for sale at the shop of Starbuck in the city of London where Bentley, the defendant in the issue, bought them on the 30th of May 1885 under circumstances not now impeached and which amounted to a sale in market overt. The appellant does not rest his claim on any other title than the purchase in market overt. Galpin & Crochard elected to avoid the contract. We must take it that they did so, but when or how does not appear, save that on their prosecution Hodder and Klein were committed for trial on the same 30th of May and since tried and convicted in September, 1885, of obtaining the goods in question by false pretences.

We have had a very able and interesting argument, but I need not follow it through all its details, for it was admitted by counsel for Bentley, looking to the long current of authorities, that if the goods had been *stolen* from Galpin & Crochard, though purchased by Bentley in market overt, he could not deny that on conviction of the thief the original owners Galpin & Crochard would have been entitled to the restoration of the goods. It seems to me that it was right to make this admission, for when we find a long train of decisions all pointing the same way we ought not to disturb them even though we should think that it would have

(1) 18 Q. B. D. 322.

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been more expedient, if practicable, to give full effect to a sale in market overt. The practice and current of authority has been the same in Ireland as in England, but especially since the decision in *Reg.* v. *Horan* (1), in which on a question reserved ten judges took part and were unanimous.

The case before your Lordships is thus reduced to the question whether *Moyce* v. *Newington* (2) was well decided. If it was well decided the appellant (Bentley) has established his right to succeed on the issue, for that case is exactly in point. I concur with my noble and learned friends in opinion that *Moyce* v. *Newington* (2) cannot be supported, as it seems to me to rest not on what the legislature has expressed but on what it ought to have said. I am unable to adopt the conclusion of the Chief Justice that the language of the legislature applies and is obviously intended to apply to cases and *to those only* in which possession has been obtained without the property passing. The legislature has not said so, and in my opinion did not intend to say so. The legislature seems rather from the time at which it first made obtaining goods by false pretences a misdemeanor to have put the misdemeanor and the cognate and closely allied offence of larceny on the same ground as to the right of restoration on conviction. I refer inter alia to 7 & 8 Geo. 4 c. 29, the title of which is "An Act for consolidating and amending the laws in England relative to larceny and other offences connected therewith." Sect. 53 enacts "And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof be it enacted that if any person shall *by any false pretence obtain* from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." "Provided always that if upon the trial of any such person it shall be proved that he obtained the property in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted." And sect. 57 enacts: "And to encourage the prosecution of offenders be it enacted, That if any person guilty of any such felony or misdemeanour in stealing, taking, *obtaining* or converting &c., any chattel &c.,

(1) Ir. Rep. 6 Com. Law, 293.

(2) 4 Q. B. D. 32.

shall be indicted for any such offence by or on behalf of the owner of the property or his executor or administrator and convicted thereof, in such case the property shall be restored to the owner or his representative." And again by 18 & 19 Vict. c. 126 (the Criminal Justice Act) where a summary jurisdiction is given in certain cases of larceny and false pretences, sect. 8 provides, "It shall be lawful for the justices by whom any person is convicted under this Act to order restitution of the property stolen, taken or *obtained* by false pretences, in those cases in which the Court, before whom the person convicted would have been tried but for this Act, may be by law authorized to order restitution."

The legislature seems to me in these general statutes, including 24 & 25 Vict. c. 96 s. 100, to have dealt with and expressed the right to restoration of the goods on the conviction of the offender in the same language and depending on the same event whether the offence was the felony of larceny or the misdemeanor of false pretences. If we were to adopt the view of the Lord Chief Justice (though it might be desirable to be able to do so) the consequences would probably be more extensive than at first sight appears; e.g. it would seem then difficult in such case to sustain a conviction for obtaining goods by false pretences where the contract was such that as between the vendor and vendee it was not absolutely void, but voidable only at the election of the vendor.

I have only to add that by this decision we do not intend to interfere with the principle established in *White* v. *Garden* (1).

LORD MACNAGHTEN:—

My Lords, I agree in the opinions which have been delivered by my noble and learned friends, and I share the regret which has been expressed in being compelled to arrive at this decision.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 5th August 1887.

Solicitor for appellant: *S. J. Attenborough.*
Solicitors for respondent: *Blunt & Lawford.*

(1) 10 C. B. 919.

[HOUSE OF LORDS.]

H. L. (E.) 1887 July 14.

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED . } APPELLANTS;

AND

HAMILTON, FRASER, & CO. . . . . RESPONDENTS (1).

Insurance (Marine)—"Perils of the seas and all other perils," &c.—Perils insured against—Words ejusdem generis—General Words—Donkey-engine, Injury to.

A steamer was insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear:—

Held, reversing the decision of the Court of Appeal (17 Q. B. D. 195), that whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the seas," &c., nor under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance."

West India and Panama Telegraph Company v. *Home and Colonial Marine Insurance Company* (6 Q. B. D. 51) disapproved.

APPEAL from a decision of the Court of Appeal (2) upon a special case stated in an action brought by the respondents against the appellants to recover £6 5*s.* for a loss under a policy.

The following statement of the facts is taken from the judgment of Lord Herschell in this House.

The policy sued on was a time policy on the steamship *Inchmaree* for twelve months, from the 20th of August 1883 to the 20th of August 1884; and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials, and all stores, valued at £20,000; and machinery, shafting, propeller, boilers, and connections, including donkey-engine and boilers, pumps, and all connections, valued at £11,000."

(1) Judgment was reserved in this and the two following cases till the arguments had been heard in all.

(2) 17 Q. B. D. 195.

The risks against which the insurance was effected are thus described: "And touching the adventures and perils which the capital stock and funds of the said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

The facts lie in a narrow compass. They are set out in a special case, stated by agreement between the parties. On the 2nd of March 1884 the *Inchmaree* was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was, that when the donkey-pump was set to work the pipes and water-chamber in the donkey-pump, and the air-chamber therein, became overcharged, and the water was forced up into the air-chamber, which, in consequence, split, and the pump was thereby damaged.

It was admitted, for the purposes of the case, that the check-valve was either allowed to remain closed or become salted up, by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up, and accident, were not due to ordinary wear and tear.

The cost of replacing the pump was about £72 10*s*. The ship and freight were warranted free from average under 3 per cent. unless the ship were stranded. But as she did become

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stranded during the voyage, the loss was not excluded by the warranty.

The parties were unable to agree as to whether there was negligence in allowing the check-valve to remain closed, or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material) after the decision of the case.

The questions stated for the opinion of the Court were, whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care, and occurred through negligence; (2) if it occurred accidentally, without negligence.

The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes L.JJ.), Lord Esher M.R. dissenting.

Feb. 15, 17. Sir *R. Webster* A.G. and Sir *C. Russell* Q.C. (*D. French* Q.C. and *Synnott* with them), for the appellants:—

The peril incurred here was not a "peril of the seas" nor "any other peril" within the meaning of the policy, i.e. not a peril ejusdem generis with perils of the seas. At one time there was a clause in policies "covering all risks incidental to steam navigation." That, it was considered, would render the underwriters liable for a break down in the machinery, and for that reason the clause was discontinued. There are no such words in the present policy, and the fallacy of the Courts below is in reading it as if those words were there. It was argued below that this was a "peril of the sea" because the injury came from the sea-water being in the wrong place. But sea-water is not "the sea;" the same thing would have happened if the water had been taken from the hot well; and the sea-water was not in fact in the wrong place. The very same thing might have happened on dry land wherever donkey-engines are used, and with the same effect. There was no explosion nor anything like it: nothing analogous to fire. In all the cases where underwriters have been held liable it has been on the ground that the peril in question was ejusdem

generis with the enumerated perils. That was the ratio decidendi of *Phillips* v. *Barber* (1), where the ship was blown over by a violent gale while in the graving dock. It is not enough that the loss occurs by a peril on the sea, which is not the same thing as a peril of the sea: *Cullen* v. *Butler* (2), where the principle governing these cases was enunciated by Lord Ellenborough.

This principle was applied in *Butler* v. *Wildman* (3), where dollars were thrown overboard to avoid capture and it was held that it was a peril of enemies and also of jettison, or ejusdem generis with jettison. See also *Fletcher* v. *Inglis* (4); *Bishop* v. *Pentland* (5); *Devaux* v. *I'Anson* (6); *Davidson* v. *Burnand* (7); *Taylor* v. *Dunbar* (8); *Merchants Trading Company* v. *Universal Marine Insurance Company* (9) cited in *Dudgeon* v. *Pembroke* (10). It may be that a thing would be a peril of the sea if it happened during a voyage, and would not be if it happened on land.

The principle of ejusdem generis was departed from in *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (11), at all events in the judgment of Lord Selborne. That decision should be overruled; it extended the meaning of "all other perils," &c. much further than had been done before. The principle was applied in *Pandorf* v. *Hamilton* (12) (now under appeal to this House), where rats gnawed a hole in a pipe whereby sea water escaped and injured rice, and this was held not to be a danger of the seas within the exception in the charterparty and bills of lading. Lord Esher there said that if rats ate the ship's side so that she could not be repaired in port so as to be a sea-going ship, the loss would not be from a peril of the sea. The present case is much stronger than that hypothetical case. *Garston Sailing Ship Company* v. *Hickie* (13) does not touch the present point. Underwriters are not liable for the negligence of the crew unless it causes a peril of the sea.

(1) 5 B. & Ald. 161.
(2) 5 M. & S. 461.
(3) 3 B. & Ald. 398.
(4) 2 B. & Ald. 315.
(5) 7 B. & C. 219.
(6) 5 Bing. N. C. 519, 540.
(7) Law Rep. 4 C. P. 117.
(8) Law Rep. 4 C. P. 206.
(9) 2 Asp. Mar. Cas. at p. 431.
(10) Law Rep. 9 Q. B. at p. 596.
(11) 6 Q. B. D. 51.
(12) 17 Q. B. D. 670, 677; post, p. 518.
(13) 18 Q. B. D. 17.

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Cohen Q.C., and *Myburgh* Q.C. (*J. Gorell Barnes* with them) for the respondents:—

The present case is covered by the general words "all other perils &c." It is within the principle of *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (1). The case finds that the *Inchmaree* was at anchor and that "for the purposes of the voyage" it was necessary to pump up the main boilers by means of the donkey-pump and engine in the usual way. It was essential to the navigation. Under such a policy as this underwriters are not liable for delay: nor for losses or misfortunes caused by the original inherent defect of the thing, or by the direct act of the assured himself, or by wear and tear. But they are liable for dangers of navigation, all accidents arising from negligent or improper navigation. That is the only principle which reconciles all the cases.

The doctrine of ejusdem generis is not correctly stated by the other side. To apply that doctrine there must be one characteristic common to all the enumerated things so that a genus can be made. When there is not the principle is not applicable. See Maxwell on Statutes, p. 297, citing *Fenwick* v. *Schmalz* (2) per Willes, J., and *Sandiman* v. *Breach* (3). Here there is no characteristic common to some of the perils named, e.g. "fire" and "thieves." Applying the ordinary rules of construction the general words would cover all losses except such as are beyond the manifest scope of marine insurance; all losses without exposure to which and risk of which navigation cannot take place; they therefore cover the present loss whether caused by accident or negligence. The present is a case of improper navigation, and the cases shew that losses from improper management of the ship on a voyage are covered by the general words, if not by "perils of the seas." The words "under steam or sail" shew that the policy was to cover incidents of steam navigation, and the appellants' argument ignores the word "adventures." *Devaux* v. *I'Anson* (4) is a strong authority for the respondents.

The case of *Merchants Trading Company* v. *Universal Marine Assurance Company* (5), relied on by the appellants, does not

(1) 6 Q. B. D. 51.
(2) Law Rep. 3 C. P. 313.
(3) 7 B. & C. 96.
(4) 5 Bing. N. C. 519.
(5) 2 Asp. Mar. Cas. 431.

affect the argument, the jury having found the ship unseaworthy, and see per Brett J. in *Anderson* v. *Morice* (1).

[They also referred to *Garston Sailing Ship Company* v. *Hickie* (2); *Woodley* v. *Michell* (3); *Carruthers* v. *Sydebotham* (4); *Paterson* v. *Harris* (5).]

Sir *R. Webster* A.G. in reply:—

The argument contrà makes the underwriter guarantee the conduct of the crew, but that is not so, unless by express agreement: Meredith's Emerigon on Insurances, chap. 12, s. 5, p. 302. The true principle is that the underwriter is not liable for the negligence of the crew unless it causes a peril of the sea.

The House took time for consideration.

July 14. LORD HALSBURY L.C.:—

My Lords, in this case a policy of marine insurance for twelve months was effected upon, among other things, a pump on board the *Inchmaree* steamer.

The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy of insurance were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance or any part thereof.

It is certain that a loss or misfortune has happened to the pump while the pump was being used for the purpose of filling the boilers of the *Inchmaree*, and the sole question is whether the loss or misfortune which did happen was one of the losses or misfortunes against which the insuring company agreed to indemnify the owners of the *Inchmaree*. If understood in their

(1) Law Rep. 10 C. P. at p. 68.
(2) 18 Q. B. D. 17.
(3) 11 Q. B. D. 47.
(4) 4 M. & S. 77.
(5) 1 B. & S. 336.

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Lord Halsbury, L.C.

widest sense the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them.

There is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what Courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used.

Now the facts here are very simple: a part of the pump was burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by a donkey-engine. On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated.

In the long line of cases quoted at the Bar there was only one (with which I will attempt to deal presently) which enunciated any different principles of construction from those I have endeavoured to set forth above, although I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided,—conspicuously I think *Devaux* v. *I'Anson* (1), where Tindal C.J. rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision there arrived at.

The great difficulty I have had in this case is the decision of Lord Selborne L.C. and Cockburn C.J. in the case of *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (2). I cannot agree with the Master of the

(1) 5 Bing. N. C. 519. (2) 6 Q. B. D. 51.

Rolls that that case does not as matter of reasoning cover the present case. With the utmost respect I can draw no real distinction between the explosion of the boiler and the bursting of the air-chamber of the pump, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion, or air and water forced into the chamber by ordinary mechanical action. But before your Lordships that case is open to review, and I cannot think that that case is reconcilable with the principles upon which policies of marine insurance have hitherto been construed. It introduces analogy as the guide by which you are to ascertain the genus to which the different species are to be attributed; so that in the future one must introduce as the true exposition of general words not *the* genus you find as applicable to the species enumerated, but any analogous genus. Sea perils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships.

I cannot think that even were the analogy perfect—which I do not think it is—this is a satisfactory mode of ascertaining what the parties meant by the words they have used; and, as I have said, this is the real function of a Court in construing an instrument. It might be reasonable for the parties to provide for such a peril, and one knows that "dangers of and incident to steam navigation" are words which have been used to provide for such casualties. But I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus "perils of the sea" limits the meaning. I think the meaning attributed to these words for more than half a century by decision makes it probable that the parties used them in that accepted sense. I therefore think the judgment of the Court of Appeal wrong, and I move your Lordships that it be reversed.

LORD BRAMWELL:—

My Lords, I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which

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the defendants were to make good, specified a great many particular perils, and "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of insurance, or any part thereof." Words could hardly be more extensive, and if the question, I ought to say *a* question on them, arose for the first time, I might perhaps give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question.

Definitions are most difficult, but Lord Ellenborough's seems right: "all cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes L.J. in *Pandorf* v. *Hamilton* (1) very good: "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody," is a damage from a peril of the sea.

I have thought that the following might suffice: "All perils, losses and misfortunes of a marine character, or of a character incident to a ship as such."

I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *Panama* case. For example, it would include the case of the ships blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by a ship. It would not include the cases put by Lord Esher, nor the case I put of the captain seized with giddiness dropping the chronometer into the hold; nor would it include the present case. The damage to the donkey-engine was not through its being in a ship or at sea. The

(1) 16 Q. B. D. 629, 633.

same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves and winds had nothing to do with it.

As a matter of principle and reasoning I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (1) wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes L.J. that the word "fire" in the policy will not sustain that judgment. The Lord Justice puts the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship, as a ship, had anything to do.

I do not like cutting down the natural meaning of words; there is always great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss. So that the judgment of the Master of the Rolls, is, I think, right, and that of the other judges wrong, and their decision should be reversed.

LORD HERSCHELL:—

My Lords, this action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy.

(1) 6 Q. B. D. 51.

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[After stating the facts in the words above set out, his Lordship proceeded as follows:—]

It was not contended at the bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words: "All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof."

It cannot be denied that, if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that these general words, following a specific enumeration, must be limited to perils ejusdem generis with those specified, or, to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur, viz., a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. Indeed, the learned counsel for the respondents themselves did not contend for so wide an interpretation. The view which they put before the House was, that they should be confined to accidents happening to the subject-matter of the insurance in the course of and incidental to the navigation.

I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the Courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.

In a case which came before the Court of King's Bench as long ago as 1816, Lord Ellenborough, in delivering the judgment of the Court, in clear and unambiguous terms, expressed their

view as to the meaning of the words in question. I refer to the case of *Cullen* v. *Butler* (1). It was an action on a policy of insurance where the ship and goods had been sunk at sea by another ship firing upon her in mistake for an enemy. The Court inclined to the opinion that the loss was not one by "perils of the sea"; but held that it was covered by the general words. Lord Ellenborough said, "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."

No case was cited at the bar from the date when this opinion was expressed (unless it be the recent case of *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (2), to which I will presently advert) which has proceeded upon a construction of the policy different from that enunciated by Lord Ellenborough.

I will briefly review the subsequent authorities. The first is *Butler* v. *Wildman* (3). There the captain of a ship had thrown a large quantity of dollars overboard to prevent them falling into the hands of an enemy, by whom he was pursued. It was held that, if not a loss by jettison, it was covered by the general words. Abbott C.J. says, "If not, strictly speaking, jettison, it is something ejusdem generis, and therefore falls within the general words." The other judges concurred in this view, Holroyd J. saying that the general words include "all losses of the same nature with those described in the enumerated risks."

Next in order of time comes *Phillips* v. *Barber* (4). A vessel placed in a graving dock for repair was, by the violence of wind

(1) 5 M. & S. 461.
(2) 6 Q. B. D. 51.
(3) 3 B. & Ald. 398.
(4) 5 B. & Ald. 161.

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and weather, thrown over on her side whereby she struck the ground with great violence and was bilged. Abbott C.J. in a judgment holding that the underwriters were liable, after quoting the general words contained in the policy, said, "These general words are, indeed, restrained in construction to perils ejusdem generis with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to me, therefore, to have been produced by a peril ejusdem generis with those specified, and to fall within the general words of the policy."

The next case, *Devaux* v. *I'Anson* (1), was much relied on by the counsel for the respondents. But though I feel some difficulty in explaining the grounds of that decision, it certainly purported to be based upon the antecedent authorities and not upon any different view of the law. The ship had, in that case, been put into a dry dock for repairs. These being completed, preparations were made for getting her afloat; she was for this purpose made fast by four cables whilst the workmen removed the sand which was under the vessel, and which consolidated the shores upon which the ship was resting. The cables strained the vessel, forcing in the ribs. The stanchions of the kelsons having all fallen from the force of the lower masts upon the keel, the garboard strake gave way, and when at last the ship was no longer upon the shores she sank into a muddy sand. At the time of her sustaining the injury the depth of the water in the dock was about four feet. She was abandoned as a constructive total loss, and the question arose whether she was lost by perils insured against. Tindal C.J., in delivering the judgment of the Court, held that she was. He said, "It is to be observed the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance.' And the cases cited and relied on by the plaintiff, *Carruthers* v. *Sydebotham* (2), *Fletcher* v. *Inglis* (3), and *Phillips* v. *Barber* (4), are sufficient authority to shew that a loss occasioned by the endeavour to get the vessel

(1) 5 Bing. N. C. 519, 540.
(2) 4 M. & S. 77.
(3) 2 B. & Ald. 315.
(4) 5 B. & Ald. 161.

afloat from the dock in which she had just been repaired was a loss within the policy." It is not easy, I confess, to see how the authorities referred to were sufficient to establish the propositions they are supposed to support. In *Carruthers* v. *Sydebotham* (1) the pilot navigating a vessel had fastened her to the pier of a dock basin in the Mersey by a rope to the shore. She took the ground and when the tide left her fell over on her side and bilged, in consequence of which when the tide rose she filled with water and her cargo was wetted. It was held that this was a stranding entitling the assured to recover for an average loss upon the goods. After a careful perusal of the judgments in this case, I am unable to see its bearing upon the point which had to be determined in *Devaux* v. *I'Anson* (2). Nor do I see the application of *Fletcher* v. *Inglis* (3). A vessel insured for twelve months was in a harbour with a hard uneven bottom; the tide having left the vessel, on its return there was a considerable swell in the harbour and the ship struck the ground hard several times and was found to be considerably injured. It was held that this was a loss by peril of the sea. Still less am I able to perceive the applicability of *Phillips* v. *Barber* (4), to which I have referred above. There was nothing in *Devaux* v. *I'Anson* (2) that I can see corresponding with the wind and weather in port, which was held in *Phillips* v. *Barber* (4) to be ejusdem generis with a storm at sea. It is unnecessary to inquire whether the decision in *Devaux* v. *I'Anson* (2) was correct. It cannot be regarded as throwing any doubt upon the canon of construction laid down by Lord Ellenborough, and more than once recognised and acted upon by Lord Tenterden. Nor is it possible to evolve any principle from it applicable to other cases. No reasons are given for the judgment, which is based solely on prior authorities, and when these authorities are examined they only determine, the one, that a ship damaged by a storm when in dry dock is damaged by causes similar to perils of the seas, the others, that vessels injured by ceasing to be water-borne, and being driven against the ground by the action of the tide, are injured by "perils of the sea."

(1) 4 M. & S. 77.
(2) 5 Bing. N. C. 519.
(3) 2 B. & Ald. 315.
(4) 5 B. & Ald. 161.

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The last case to which I need refer on this point is *Davidson* v. *Burnand* (1), where Willes J. expressly recognised the rule of construction laid down in *Cullen* v. *Butler* (2). He said: "The question is not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from the perils of the sea."

I think therefore that the case now before your Lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by Lord Ellenborough; that is whether it is a case "of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." When the facts are borne in mind it seems necessary only to state the question in this way to see that the answer must be in the negative. To which of the specially enumerated perils is it similar? The only one that could be suggested is "perils of the seas." The damage here arose from the air-chamber of the donkey-pump giving way under an excessive pressure of water, owing to the proper outlet being closed. It is, I think, impossible to say that this is damage occasioned by a cause similar to "perils of the sea," on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance.

The respondents placed their main reliance upon the case of *West India Telegraph Company* v. *Home and Colonial Insurance Company* (3), and naturally so, because the majority of the Court of Appeal thought the present case undistinguishable from it. Lord Selborne and Cockburn L.C.J. in that case held that the damage done by the explosion of the boiler of a steamer

(1) Law Rep. 4 C. P. 117. (2) 5 M. & S. 461.
(3) 6 Q. B. D. 51.

was covered by the general words of a marine policy. Lord Selborne, after referring to the effect given to these words in *Devaux* v. *I'Anson* (1), said: "I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boiler or from defects of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of wind and defects or mismanagement of a ship's sail or tackle." I have already given my reasons for doubting whether *Devaux* v. *I'Anson* (1) involved any principle which could properly be extended by analogy to a case not precisely similar in its facts. Moreover it is to be observed that in *Devaux* v. *I'Anson* (1) the damage done was done to the ship as such. It arose from her being constructed for the purpose of being water-borne, and thus needing some substituted support, if the support of the water was withdrawn; and the damage to the ship was due to her grounding and the failure to keep her safely supported. It is on this view alone, I think, that the case can be sustained. But the explosion of the boiler on board the *Panama* had no marine character at all. It might have happened in precisely the same way and done the same kind of damage if the steam-engine had been in use for the purpose of moving manufacturing machinery on shore. The real ground of Lord Selborne's judgment appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel, and the excessive pressure of steam in the boiler when the motive power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one; but, even if be so, I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over-pressure of which caused the damage, was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not,

(1) 5 Bing. N. C. 519.

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as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind.

The present Master of the Rolls, although he concurred in the judgment of the majority of the Court in *West India Telegraph Company* v. *Home and Colonial Insurance Company* (1), differed in his reasons. He based his judgment solely on the ground that the explosion was ejusdem generis with fire, and therefore the loss was within the general words. In the case now under appeal he intimated that this reasoning was somewhat fanciful, and that he should not be sorry to see it dissented from. I am certainly disposed to prefer the latter view of the learned judge; but it is not necessary to discuss the point, as it is obvious that such a ground of decision can have no bearing upon the case we have to deal with. I may add, however, that since the term "fire" has been added to the specially enumerated risks (which has taken place in comparatively recent times) I think the general words may properly be extended to similar risks which would not have been included before.

Upon the whole I have come to the conclusion that the judgment of the Master of the Rolls in the Court below was correct. I believe it to have been not only in accordance with the authorities, but in harmony with the common understanding of those who enter into contracts of marine insurance. Several instances were put in the course of the argument of disasters which are of common occurrence and which would seem to be just as much within the general words as that which is now in question, but in respect of which it has never been suggested that the underwriters were liable. I accordingly concur in the judgment which has been moved.

LORD MACNAGHTEN:—

My Lords, in March 1884 the *Inchmaree* was off Diamond Island lying at anchor and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine with a donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that

(1) 6 Q. B. D. 51.

the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water being unable to make its way into the boiler was forced back and split the air-chamber and so disabled the pump. That was the beginning and the end of the misfortune.

At this time the *Inchmaree* with her machinery, including the donkey-engine, was insured by a time policy.

The question is, was the loss which resulted from this mishap covered by the policy or not? The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases,—perils of the seas and other well-known risks,—to which the indemnity was to extend. Then follow general words apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance.

It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted in order to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases. For example, if the expression "perils of the seas" is given its widest sense the general words have little or no effect as applied to that case. If on the other hand that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler* (1), and loss by perils of the seas is to be confined to loss ex marinæ tempestatis discrimine, the general words become most important. But still, ever since the case of *Cullen* v. *Butler* (1) when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases "akin to" or "resembling" or "of the same kind as" those specially mentioned. I see no reason for departing from

(1) 5 M. & S. 461.

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this settled rule. In marine insurance it is above all things necessary to abide by settled rules and to avoid anything like novel refinements or a new departure.

It was objected by Mr. Cohen that the rule of ejusdem generis does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so, at any rate where several distinct cases are enumerated leading to a common result or intended to be met by a common remedy. A familiar instance occurs in the Companies Act 1862 and the earlier Act of 1848 in the sections which provide for winding-up. There are several sub-sections specifying various cases in which a winding-up order may be made, and then there is a sub-section providing that the Court may make an order whenever it thinks it just and equitable. Under both Acts those general words have always been held to be restricted to cases ejusdem generis with those previously mentioned and not to give the Court a general power to make an order whenever it thinks right to do so.

Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

In the present case although the Court of Appeal has properly treated the general words as restricted to cases ejusdem generis with those specially enumerated, the majority of the Court has held the accident within the policy. I am unable to adopt their conclusion. The accident in my opinion was not due to the "perils of the seas," using that expression in the widest sense that I can give to it, nor did it result in sea damage of any kind.

I am therefore of opinion that the view of the Master of the

Rolls is correct and that the judgment of the Court of Appeal must be reversed.

Order appealed from and the judgment of the Queen's Bench Division reversed; the respondents to pay the costs of the appellants in the Courts below and in this House: cause remitted to the Queen's Bench Division.

Lords' Journals 14th July 1887.

Solicitors for appellants: *Gregory, Rowcliffes & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *T. W. Rossiter for Hoyle, Shipley & Hoyle, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

THOMAS WILSON, SONS & CO. . . . APPELLANTS;

AND

THE OWNERS OF THE CARGO PER THE "XANTHO" . . . . . } RESPONDENTS.

THE "XANTHO."

Ship—Bill of Lading—Perils of the Sea—Collision—Negligence.

Foundering caused by collision with another vessel is within the exception "dangers and accidents of the sea" in a bill of lading; and excuses the shipowner for non-delivery of the goods if it occurs without fault in the carrying ship:—

So *held*, reversing the decision of the Court of Appeal (11 P. D. 170). *Woodley* v. *Michell* (11 Q. B. D. 47) overruled.

APPEAL from a decision of the Court of Appeal (1).

The respondents having brought an action in the Probate, Divorce, and Admiralty Division against the appellants the cause came on for trial before Sir J. Hannen. The following statement of the pleadings and of the course of the trial is taken from the judgment of Lord Herschell in this House.

(1) 11 P. D. 170.

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The owners of cargo by the steamship *Xantho*, who were the plaintiffs in the action, by their statement of claim alleged that they had suffered damage by breach of the contract contained in the bills of lading of goods shipped at Cronstadt on board the defendants' vessel *Xantho* for carriage to Hull, that the bills of lading were indorsed to the plaintiffs to whom the property in the goods passed by such indorsement, and that the goods were not delivered. The statement further alleged alternatively that the plaintiffs had suffered damage from the loss of their goods whilst on board the defendants' vessel by a collision with the steamship *Valuta*, caused by the negligent navigation of the defendants' servants.

The statement of defence denied the contract and the breach, and also that the bills of lading were indorsed to the plaintiffs, and that the property in the goods thereby passed to them. In answer to the alternative claim it admitted that the *Xantho* came into collision with the *Valuta*, but denied that the collision was caused by the negligent navigation of the *Xantho*, alleging that it was solely caused by the negligent navigation of the *Valuta*. The defence further alleged that the loss was occasioned by perils which were excepted by the bills of lading.

The action came on for trial before the President of the Probate and Admiralty Division. The learned counsel for the plaintiffs put in, as his only evidence, the bills of lading and admissions that the property in the goods and the right to sue on the bills of lading had passed to the plaintiffs, and that the goods had not been delivered. The bills of lading which were in the usual form contained an exception in these terms:—"The act of God, Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the sea, rivers, and steam navigation of whatever nature and kind soever excepted."

In opening his case the plaintiffs' counsel stated that the *Xantho* was lost by reason of a collision which took place between that vessel and the *Valuta* in a fog, and submitted that whether the collision arose from the negligence of those navigating the *Xantho* or of those navigating the *Valuta*, or from the negligence of both combined, the loss of the goods did not fall within the exception contained in the bill of lading, and that the plaintiffs

were in either case entitled to recover. He relied in support of this contention upon the case of *Woodley* v. *Michell* (1).

The learned counsel for the defendants admitted that if *Woodley* v. *Michell* (1) were good law, he could not resist this view, that even if he proved that no negligence was to be imputed to the *Xantho*, and that the disaster was solely due to the negligence of the *Valuta*, as he could not prove that it arose from an inevitable accident, the result must be a decision for the plaintiffs. He considered, therefore, that the only course open to the defendants was to test the law laid down in *Woodley* v. *Michell* (1) by appeal to this House.

The learned President thereupon gave judgment for the plaintiffs.

The Court of Appeal (Lord Esher M.R. Bowen and Fry L.JJ.) affirmed the President's decree (2).

Against these decisions the defendants appealed.

March 17. Sir *R. Webster* A.G. and Sir *W. Phillimore* (*J. P. Aspinall* with them) for the appellants:—

The present is really an appeal against *Woodley* v. *Michell* (1). That decision is inconsistent with all the other authorities (except a dictum of Brett L.J. in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (3)) and should be overruled. Collision is a peril of the sea; it is one of the dangers or accidents intended to be insured against. This is admittedly so in insurance cases when the collision is brought about by the negligence of another ship, and it does not cease to be so when the ship insured is also in fault: *Smith* v. *Scott* (4); *Hale* v. *Washington Insurance Company* (5) per Story J. Collision then being a peril of the sea within the meaning of a policy of insurance, it must also be a peril of the sea within the meaning of a bill of lading. The same meaning must be given to the same words in both instruments. But the difference of liability in the two cases arises from the circumstance that under a bill of lading the shipowner cannot excuse himself from his liability as

(1) 11 Q. B. D. 47.
(2) 11 P. D. 170.
(3) 10 Q. B. D. 521, 530.
(4) 4 Taunt. 126.
(5) 2 Story Rep. (U. S.) 176.

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carrier if the peril—i.e. the collision—be brought about by his own negligence. The reason of this is that in a policy of insurance the causa proxima alone is to be considered; whereas in a contract of carriage the causa remota may be looked at, and the carrier cannot take advantage of his own wrong which caused the collision. An illustration of this appears in *Lloyd* v. *General Iron Screw Collier Company* (1), where it was assumed that collision was "an accident or damage of the seas"; and see *Phillips* v. *Clark* (2). The distinction between the liability of an insurer and of a shipowner was clearly pointed out by Willes J. in *Grill* v. *General Iron Screw Collier Company* (3). Collision having been proved by the shipowner the burden of proof is shifted on to the cargo owner, who must prove that the collision was caused by the shipowner's negligence: *Czech* v. *General Steam Navigation Company* (4); *The Helene* (5); *The Norway* (6).

Collision with a sunken rock is admittedly a peril of the sea. Then why not also collision with another vessel? And what difference can it make that the negligence of a third party is the cause? The negligence of other vessels is as much a matter beyond the shipowner's control as the violence of the winds and waves. The words "perils" or "dangers and accidents of the seas" are certainly large enough to include collision; for they were held to include pirates and men-of-war before those words were introduced: *Pickering* v. *Barkley* (7).

Woodley v. *Michell* (8) was distinguished in *Garston Sailing Ship Company* v. *Hickie* (9) where it was held that a collision caused solely by the negligence of another ship was a "danger or accident of *navigation*" within the meaning of a charterparty.

Hollams (Sir *C. Russell* Q.C. with him) for the respondents:—

The decision below was right and for the reasons there given. The burden of proof that the loss was caused by the excepted dangers was on the defendants; and they failed to prove it. Primâ facie a collision is not a danger or accident of the seas;

(1) 3 H. & C. 284.
(2) 2 C. B. (N.S.) 156.
(3) Law Rep. 1 C. P. 600, 611.
(4) Law Rep. 3 C. P. 14, 19, n.
(5) Br. & Lush. 429; Law Rep. 1 P. C. 231.
(6) Br. & Lush. 404.
(7) 2 Roll. Abr. 248, pl. 10.
(8) 11 Q. B. D. 47.
(9) 18 Q. B. D. 17.

from the mere fact of collision no inference can be drawn. The present was admittedly not a case of inevitable accident: therefore there must have been negligence in some one. If the negligence was partly or wholly that of the carrier he is not relieved from liability. It was for the defendants therefore to shew how the collision occurred; and this being so the judgment below was right, whether *Woodley* v. *Michell* (1) be good or bad law. As to the burden of proof being on the shipowners see 1 Taylor Ev. §§ 364, 365; Angell on Carriers, § 202; *Czech* v. *General Steam Navigation Company* (2) per Willes, J.; and *Taylor* v. *Liverpool and Great Western Steam Company* (3). The exception in the charterparty is only intended to exempt from misfortunes which human prudence cannot guard against: *Buller* v. *Fisher* (4); the defendants have not shewn that they could not guard against this one. To bring a case within "perils of the sea," there must be some extraordinary violence of the elements, something inevitable or overwhelming. A strong authority for the respondents is the opinion of Story J. to this effect in Story on Bailments § 512 a. In policies of insurance a more liberal construction is adopted than in charterparties and bills of lading, which should be interpreted strictly against the carrier. If the House should consider the judgment below wrong there must be a new trial, that the real facts may be known.

Sir *R. Webster* A.G. replied.

The House took time for consideration.

July 14. LORD HERSCHELL:—

My Lords, in order to render clear the exact point which has to be determined in this case it will be necessary to state with some minuteness the pleadings and the course which the case took at the trial.

[After stating the pleadings and the course taken at the trial in the words above set out his Lordship proceeded as follows:—]

I think the defendants' counsel was perfectly correct in the

(1) 11 Q. B. D. 47.
(2) Law Rep. 3 C. P. 14, 19.
(3) Law Rep. 9 Q. B. 546.
(4) 3 Esp. 67.

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course which he took. If he had proved to demonstration that his vessel was free from blame, and that the other vessel's negligence alone caused the disaster, he would have established no defence so long as *Woodley* v. *Michell* (1) stood. He accordingly wisely abstained from the idle task of attempting to prove facts which the Court of Appeal had held to be wholly immaterial.

It appears to me that the only question which arises for your Lordships' determination in this case is whether the decision in *Woodley* v. *Michell* (1) can be sustained. In that case an action was brought on a bill of lading. The goods were lost owing to a collision between the defendants' vessel and another vessel. The jury found that there was no negligence on the part of the master or crew of the carrying vessel. The Court of Appeal held that the defendants were not protected by the exception of "perils of the sea" contained in the bill of lading, and gave judgment for the plaintiffs. The Master of the Rolls said: "What I think it necessary in this case to say (and I repeat it without any doubt) is, that although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." And Cotton L.J. thus expresses himself:—"There is no decision which is binding upon us that a collision occasioned by the negligence of one of the ships is a peril of the sea. Looking, then, upon it with reference to decided cases, and according to the ordinary interpretation of words, I cannot see how, if there was no peril from sea or wind, and an accident is caused by the negligent act of one of the two ships which comes into collision, that can be said to be a peril of the sea."

The question, What comes within the term "perils of the sea" (and certainly the words "dangers and accidents of the sea" cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

(1) 11 Q. B. D. 47.

I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (1), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

But it is said that the words "perils of the sea" occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the causa proxima alone is regarded; whilst, in the former, you may go behind the causa proxima, and look at what was the real or efficient cause.

(1) 5 M & S. 461.

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It is on this view that the Court of Appeal acted in *Woodley* v. *Michell* (1).

Now, I quite agree that in the case of a marine policy the causa proxima alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words "perils of the sea" having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by Willes J. in his judgment in *Grill* v. *General Iron Screw Collier Company* (2). The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of "perils of the sea." It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, Willes J. said, "I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the

(1) 11 Q. B. D. 47.

(2) Law Rep. 1 C. P. 600, 611.

sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."

So far as I am aware, until the case of *Woodley* v. *Michell* (1) was decided, there was no authority for saying that a loss the proximate cause of which was a peril of the sea, and which did not result from the act or default of the carrier, was not within the exception. In the case of the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (2), the present Master of the Rolls suggested the view that a loss by a collision due to the negligence not of the carrying but of the other vessel, was not a loss by perils of the sea. He said: "If the collision is caused without any fault on the part of the carrying ship, but is caused by reason of negligence on the part of those who are conducting the other ship, it cannot be called an accident of the sea. An accident is that which happens without the fault of anybody, and consequently a collision which is the fault of somebody is not an accident of the sea." This was a dictum certainly not necessary for the decision of that case. But in *Woodley* v. *Michell* (1) it was repeated and adopted as the ground of judgment. With the greatest respect for that learned judge, the weight of whose opinion on any question of maritime law I fully recognise, I am unable to perceive why a loss occasioned by an inroad of the sea owing to a casualty over which the shipowner and his servants had no control, should not be held to be within the exception. If the distinction pointed out by Willes J. between the rules governing the construction of policies of marine insurance and bills of lading be the true one, it is certainly not applicable to such a case. I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis, if it were to be held that the exception of perils of the seas in a bill of lading was always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency. Take the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost, because the light which should have warned the mariner against it has

(1) 11 Q. B. D. 47. (2) 10 Q. B. D. 521, 530.

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become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, whilst a similar loss arising from a vessel coming into contact with a rock not marked upon the chart admittedly would be? And what substantial distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of *Woodley* v. *Michell* (1) cannot be supported.

It was contended by the learned counsel for the appellants that if your Lordships should take this view, the judgment ought to be entered for them. I cannot concur in this. With the authority of *Woodley* v. *Michell* (1) in their favour, when once it was admitted that the accident was not inevitable, it was as fruitless for the respondents to give evidence of the negligence of the appellants as it was for the appellants to seek to cast the blame on the other vessel. Much argument was addressed to your Lordships on the question, whether when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must shew that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view. I certainly must not be understood as deciding that the mere proof of loss by collision, under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate the defendants.

I move your Lordships that the judgment appealed from be reversed, and that there be a new trial of the action.

LORD BRAMWELL :—

My Lords, my noble and learned friend has been kind enough to read his opinion first in consequence of its containing a fuller

(1) 11 Q. B. D. 47.

statement of the facts than what I am about to read to your Lordships.

The plaintiffs' statement of claim is for the non-delivery of goods according to a bill of lading, with an alternative claim for loss of the goods therein mentioned, owing to the negligence of the defendants. It was admitted at the trial by the defendants that the goods had not been delivered according to the bill of lading. It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of inevitable accident, i.e. of winds, waves, or other natural causes. The plaintiffs contended, on the authority of *Woodley* v. *Michell* (1), that that being so they were entitled to judgment, whether the collision was attributable to the negligence of the defendants with or without negligence on the other ship, or wholly to the negligence of that other. The President so ruled, considering himself bound by *Woodley* v. *Michell* (1). That case decided that a damage including foundering occasioned by collision was not a loss by perils of the sea within those words of exception in a bill of lading, unless occasioned by action of sea or wind or inevitable accident, and therefore that a collision occasioned, whether by the negligence of the one ship or the other, or both, was not a loss by such perils. The now defendants appealed, but the ruling was upheld, the Court giving reasons for their opinion, and also relying on the case of *Woodley* v. *Michell* (1). With great respect I cannot agree. I think that case wrongly decided, and I differ from the reasons given in support of the judgment in that and in this case. Was it by a peril of the sea that the defendants' ship foundered? The facts are, that the sea-water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shews she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted

(1) 11 Q. B. D. 47.

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that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other? The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading should say, "I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea." The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a causa sine quâ non, but it was not the causa causans. It was causa remota, but not causa proxima. The causa proxima of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, "Oh, the loss is not by perils of the seas, but by bad carpentering." Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas.

It is only necessary for this House to say that if the foundering was occasioned by a collision, with no blame on the defendants, they ought to have succeeded. For this is what they offered to prove, and were told that it was useless to do so. Mr. Hollams argued that they ought to have insisted on their right to prove their case. I am clearly of a different opinion. I think when

the judge says, "I shall decide against you though you prove what you say," the party must acquiesce for the time, and seek his remedy by appeal. I think that the judge might properly refuse to hear the evidence, for he might truly say that in his opinion this evidence is irrelevant to any issue on the record; no one giving it would be liable to the penalty of perjury. The practice in my experience has always been in conformity with what I am now saying.

The judgment, then, must be set aside. The Attorney-General contended that it should be entered for the defendants. That also is impossible. It could not have been done before the Judicature Act, and that Act does not authorize it. It would be most unjust to the plaintiffs. They, relying on the law as it had been laid down, proved what was a sufficient case, and did not give what would have been irrelevant evidence if the law had been rightly laid down. I say nothing about burden of proof. All I say is, that if the collision was in no way the fault of the defendants' crew they are entitled to judgment.

LORD MACNAGHTEN:—

My Lords, in this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods entrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.

Turning now to the facts of the case, we find that it was

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admitted at the trial that the vessel with the goods on board foundered at sea in consequence of a collision. The exception in the bill of lading includes "dangers and accidents of the sea." Is shipwreck by collision a danger or accident of the sea? I should say, undoubtedly it is. Then comes the question, How was the collision brought about? Of that we know nothing, except that it was not due to inevitable accident. So much was admitted. It follows from that admission that one or both of the vessels that came into collision must have been to blame.

In that state of things I should have thought that the issue between the parties was reduced to this question, Was the carrying vessel in fault? If it was not, the shipowner is protected. If it was, though the loss occurred through one of the excepted perils, the shipowner cannot rely on the exception.

Unfortunately that simple issue was obscured, and the trial of the action was rendered abortive by reason of the decision in *Woodley* v. *Michell* (1). In the face of that decision it would have been idle for the parties to have gone into the facts at the trial. It would have been a work of supererogation on the part of the plaintiffs to have proved that the carrying vessel was in fault. The defendants would have been no nearer winning if they had established by the clearest evidence that up to the moment of collision they had performed every duty cast upon them. Under these circumstances the parties have been compelled to come to your Lordships' House, appealing in form against the judgment of the Court of Appeal in the present case, but in reality against the decision in *Woodley* v. *Michell* (1).

Your Lordships are therefore called upon to determine whether the rule laid down in *Woodley* v. *Michell* (1) can be supported on principle or authority. Authority in its favour there is none. The industry of counsel could not produce any passage from any recognised treatise, or from any reported judgment, countenancing the doctrine, except one observation in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (2) which was not necessary for the decision.

It seems to me to be equally difficult to support the rule in *Woodley* v. *Michell* (1) on principle. If the accident is brought

(1) 11 Q. B. D. 47.

(2) 10 Q. B. D. 530.

about by the negligence of the owner of the carrying vessel, or his servants, it would be contrary to common sense and against all sound principle to allow one who was the author of the mischief to avail himself of his own wrong. But if the carrying shipowner is free from all blame, why should he suffer for the errors or misconduct of those over whom he has no control? As far as he and his vessel are concerned what difference can it make whether the collision is caused by a sunken rock, or by an iceberg, or by another vessel, or whether that other vessel is or is not in fault?

It seems to me, if I may say so with all deference, that the error of the Court of Appeal in the present case is to be found in this: they start with the assumption that the same words have different meanings when used in policies of assurance and when used in bills of lading. For that assumption there is not, I venture to think, any foundation. Different considerations, no doubt, apply to the two contracts, a contract of indemnity and a contract of carriage, and the same event may have a different result in the one case from what it would have in the other; but in mercantile contracts so closely connected the same words must have the same meaning. Whatever the expression "perils of the sea" means in a policy of assurance, it means neither more nor less in a bill of lading.

The result in my opinion is, that the appeal must be allowed and the litigant parties must begin over again.

Orders appealed from reversed; and a new trial ordered; the costs of the trial already had to be costs in the cause; and the costs in the Court of Appeal and in this House to be defendants' costs in the cause; cause remitted to the Probate, Divorce, and Admiralty Division.

Lords Journals 14th July 1887.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Hollams, Son & Coward.*

[HOUSE OF LORDS.]

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HAMILTON, FRASER & Co. . . . . APPELLANTS;

AND

PANDORF & Co. . . . . RESPONDENTS.

Ship—Charterparty—Bills of Lading—Exceptions—"Perils of the seas"—"Dangers and accidents of the seas"—Damage caused by Sea-water through Hole eaten by Rats.

Rice was shipped under a charterparty and bills of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants:—

Held, reversing the decision of the Court of Appeal (17 Q. B. D. 670) and restoring the decision of Lopes L.J. (16 Q. B. D. 629), that the damage was within the exception and that the shipowners were not liable.

APPEAL from a decision of the Court of Appeal (1).

The action was brought by the respondents against the appellants to recover damages for injury to rice shipped by the respondents on board the appellants' vessel the *Inchrhona* during a voyage from Akyab to Bremenhaven.

The pleadings and the facts proved at the trial before Lopes L.J. and a special jury at Liverpool in July 1886 are stated in the judgment of that learned judge (2). For the present report the following brief outline is sufficient.

The rice was shipped under a charterparty and bills of lading. The exceptions in the charterparty were:—"The act of God, the Queen's enemies, restraints of princes and rulers, fire and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever, and errors of navigation during the said voyage." The exceptions in the bills of lading were: "The act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever."

During the voyage rats gnawed a hole in a pipe which con-

(1) 17 Q. B. D. 670. (2) 16 Q. B. D. 629.

nected the bath-room with the sea. Through this hole sea-water escaped and damaged the rice. Some discussion took place at the trial as to whether there was negligence on the part of the shipowners, but, as will be seen from the judgments in this House, it is to be assumed as the result of the trial that the injury happened without any neglect or default on the part of the shipowners or their servants.

Lopes L.J. holding that the damage was within the exceptions gave judgment for the defendants (1). The Court of Appeal (Lord Esher M.R. and Bowen and Fry L.JJ.) reversed this decision and entered judgment for the plaintiffs (2).

Against this judgment the defendants appealed.

May 12, 13. *Bigham* Q.C. and *J. Gorell Barnes* for the appellants:—

The ship being seaworthy and there being no negligence in the shipowners or their servants the shipowners are not liable. Any incursion of sea-water during the voyage from natural causes which cannot be guarded against by ordinary care and skill is an accident of the sea. The escape of seawater was an accident of the sea, and was caused by something for which no human being was responsible. "Perils" or "accidents of the sea" mean the same thing in charterparties and bills of lading as in policies: but in charterparties and bills the plaintiff is entitled to go behind the proximate cause, and if it appears that the carrier was negligent he cannot avail himself of the exception: *Grill* v. *General Iron Screw Colliery Company*, per Willes J. (3). Whenever the ship leaks without fault in the owner it is a peril of the sea. There cannot be any difference whether the hole be caused by a mouse or a mountain—of ice, i.e. an iceberg. The latter case is admittedly a peril of the sea. What difference is there in principle between an incursion of sea-water through a collision-hole, and one through a rat-hole? Collisions with sunken rocks and with other vessels without negligence in any one are perils of the sea. So is a collision with a sword-fish which makes a hole in the ship's side. Granted that damage done by

(1) 16 Q. B. D. 629. (2) 17 Q. B. D. 670.
(3) Law Rep. 1 C. P. 600, 611; affirmed 3 C. P. 476.

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vermin to the ship itself or the cargo is not a peril of the sea; but that is because no sea-water comes in, there is no peril *of the sea*; it might have happened on land: *Hunter* v. *Potts* (1); *Laveroni* v. *Drury* (2); *Kay* v. *Wheeler* (3); *Hazard's Administrator* v. *New England Marine Insurance Company* (4). In the Law Journal report of *Laveroni* v. *Drury* Pollock C.B. is reported to have said, "If indeed the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea-damage." And Alderson B. said, "Our judgment does not touch that question. A rat making a hole in a ship may be the same thing as if a sailor made one." Except the above dicta there is no authority upon the present question. The cases cited below for the respondents have no real bearing on the question, e.g. *Dale* v. *Hall* (5), where there were no excepted perils: the hoyman was liable as a common carrier. *Pickering* v. *Barkley* (6), holding that "pirates" were a peril of the sea before that word was inserted in the exceptions, rather helps the appellants as shewing that a peril on the sea is a peril of the sea. In *Rohl* v. *Parr* (7) Lord Kenyon left the question, whether destruction of the ship's bottom by worms was a peril of the sea, to the jury as a question of fact. Moreover destruction by worms was an ordinary event to be expected and guarded against.

[They also referred to *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (8); *Woodley* v. *Michell* (9); *Garston Sailing Ship Company* v. *Hickie* (10), and *The Xantho* (11), on the question as to how far collision was a peril of the sea. Also to *Dixon* v. *Sadler* (12); *Busk* v. *Royal Exchange Assurance Company* (13); and *Laurie* v. *Douglas* (14); as to the liability under bills of lading and policies of insurance respectively. Also to *Garrigues* v. *Coxe* (15); Carver on Carriage,

(1) 4 Camp. 203.
(2) 8 Ex. 166; 22 L. J. (Ex.) 2.
(3) Law Rep. 2 C. P. 302.
(4) 8 Peters, U. S. 557.
(5) 1 Wils. 281.
(6) Styles, 132; 2 Roll. Abr. 248.
(7) 1 Esp. 444.
(8) 10 Q. B. D. 521.
(9) 11 Q. B. D. 47.
(10) 18 Q. B. D. 17.
(11) 11 P. D. 170; ante, p. 503.
(12) 5 M. & W. 405.
(13) 2 B. & Ald. 73.
(14) 15 M. & W. 746.
(15) 1 Binney, Penn. 592.

p. 92; 1 Parsons' Shipping (ed. 1869) p. 258; 1 Parsons' Mar. Insur. (ed. 1868) p. 545; *Hamilton* v. *Thames and Mersey Marine Insurance Company* (1); and *The Schooner Reeside* per Story J. (2) upon the meaning of the expression "perils of the sea."]

Sir *C. Russell* Q.C. and *Joseph Walton*, for the respondents:—

The decision of the Court of Appeal was right for the reasons there given. The argument contrà confuses cause and consequence. To bring a case within the exception the peril must be a peril or accident *of the sea* which causes damage. The incursion of sea-water is or may be (it is not always) a peril of the sea. But the action of rats' teeth (which is the real, the effective cause of the loss) is not a peril of the sea; nor on the sea. It has nothing to do with the sea or the elements.

The general proposition of the appellants that an incursion of sea-water without fault in the carrier is a peril of the sea is not true; e.g., if a sailor barratrously scuttles the ship; the master is not negligent, and is not liable for the wilful act of his servant, but there is no peril of the sea; *The Chasca* (3). *Merchants Trading Co.* v. *Universal Marine Insurance Co.* (4) is an instance of an incursion of sea-water, without negligence, not being a peril of the sea. So of a stowaway scuttling the ship. So if (as actually happened lately) a boiler plate got loose (without negligence in any one) and knocked a hole in a pipe. So in the present case if instead of rats eating the hole a passenger accidentally forgot to turn off the tap in the bath room and so flooded the cargo. Again, there must be something extraordinary, unforeseen, fortuitous, something that cannot be guarded against by ordinary care or skill, or there is no peril of the sea: *Magnus* v. *Buttemer* (5); 2 Arnould Mar. Insur. 6th ed., p. 755; Story on Bailments, 512a.

To relieve himself of liability the shipowner must shew that he is prevented from delivering the goods by an *accident*. What is there accidental in the present case? When a ship puts to sea, the ordinary action of the sea is not a peril of the sea. A peril

(1) 17 Q. B. D. 195, antè, p. 484.
(2) 2 Sumner, U. S. 567, 571.
(3) Law Rep. 4 A. & E. 446.
(4) 2 Asp. Mar. Cas. (N.S.) 431.
(5) 11 C. B. 876.

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is what *may*, not what *must* happen. So worms, natural decay, taking the ground in ordinary navigation are not perils of the *sea*, but perils of the *ship*. A sunken rock, an iceberg, a sword-fish, are perils of the sea, but they are outside the ship. The rats are inside the ship and essentially of it: they have nothing to do with the sea: and this makes the distinction. There is no decision and no authority in favour of the appellants' contention.

[They also referred to *Cullen* v. *Butler* (1), *Taylor* v. *Curtis* (2), and *Fletcher* v. *Inglis* (3).]

Bigham Q.C. in reply:—

The cause of damage was the sea: without the sea it would not have happened. If the wind lifts up the sea and drops it on to the ship, whether in the form of a waterspout or not, that is a peril of the sea. So if the wind causes the ship to work and labour and open seams whereby the water gets in, though the sea be calm and does nothing. The appellants' proposition is accurate, with the qualification that the loss must not be attributable to any human default: as Lopes L.J. said, "sea damage occurring at sea and nobody's fault." (4)

The House took time for consideration.

July 14. LORD HALSBURY L.C.:—

My Lords, in this case the admissions made at the trial reduce the question to this: whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea-water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the seas.

With all respect to Bowen and Fry L.JJ., they have not accepted the hypothesis of fact which the admissions at the trial render essential. It is admitted that the ship was seaworthy, and

(1) 5 M. & S. 461.
(2) 6 Taunt. 608.
(3) 2 B. & Ald. 315.
(4) 16 Q. B. D. 635.

that there was no negligence, and these admissions are absolutely inconsistent with the reasoning of the Lords Justices, which suggests important difficulties in deciding those questions of fact to which I have referred, but seems beside the question if these facts are proved or admitted, as I think it is clear they were.

The other question with which the Master of the Rolls dealt is one which must be determined upon the ordinary rules of construction, whatever the document is, the meaning of which is under debate; and it must be admitted that words may receive a limited meaning by reason of the other words with which they are associated, or by reason of the subject-matter with which they deal, or by reason of the mode in which they are commonly used.

It is clear that the parties do not mean by such an instrument as we are construing to except all accidents of any kind or description whatsoever which may happen during the particular voyage which both parties are looking forward to.

Some effect must be given to the words "perils *of the sea*." A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese.

This was the decision of the Court of Exchequer in *Laveroni* v. *Drury* (1). In the Law Journal report of that case Pollock C.B. and Alderson B. distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea being let in by a hole made by a rat was an accident or danger of the sea. One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel upon which the vessel was to sail in accomplishing her voyage, it would not necessarily be by a storm, the parties have not so limited the language of the contract; it might be by striking on a rock, or by excessive heat so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in, but what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) should do damage

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

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by letting the sea into the vessel, that that should be one of the things contemplated by the contract.

A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

In the class of contract where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words "*dangers and accidents* of the seas."

Now cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a *sea* peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, "peril" or "accident;" you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.

One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from

within the vessel, and not by a sword-fish from without,—the sea water did get in.

I am therefore of opinion that the judgment should be reversed, and I move your Lordships accordingly.

LORD WATSON :—

My Lords, the respondents sue for damages in respect of injury sustained, during transit, by a cargo of rice, which was carried in the appellants' steamship *Inchrhona*, from Akyab to Bremen. The appellants plead, in defence, that the injury was occasioned by a danger or accident of the sea, within the meaning of the exception in the charterparty and bills of lading, which are in the usual terms. In point of fact the rice was damaged by sea water, which found its way into the hold of the *Inchrhona* through a hole gnawed by a rat, in a leaden pipe connected with the bath-room of the vessel.

If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a port-hole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage a meaning must be attached to the expression "dangers and accidents of the sea" different from that which it bears in a contract insuring cargo against sea risks; that, in a case of a charterparty or bill of lading, the Court ought to look to what has been termed the remote as distinguished from

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the proximate cause of damage, whereas, in the case of a policy the proximate cause can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound, by the implied terms of his contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible. As Lord Blackburn said in *Steel* v. *State Line Steamship Company* (1), "Although the things perish by a peril of the sea, still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception."

I am of opinion that the appellants must prevail, because it has not been shewn that the peril which was the immediate and efficient cause of damage owed its existence to their negligence. In the course of the trial before Lopes L.J. it does appear to have been, at one time, suggested that the appellants' servants failed to exercise due diligence in extirpating the rats, and also that the bath-room pipe ought not to have been of lead, but of some other material which a rat could not or would not gnaw. Neither of these points was submitted to the jury, who negatived the only charge of negligence which was ultimately insisted in by the respondents. I accordingly concur in the judgment which has been moved.

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment must be reversed. This is the third case in which this House has had to consider whether a peril of the sea or other peril within the general words was shewn. The arguments and discussions in all three have been very useful in helping to a conclusion. As I have said elsewhere, I think the definition of Lopes L.J. very good: "It is a sea damage, occurring at sea, and nobody's fault." What is the "peril?" It is that the ship or goods will be lost or

(1) 3 App. Cas. 88.

damaged; but it must be "of the sea." "Fire" would not be a peril of the sea; so loss or damage from it would not be insured against by the general words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in, and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shewn in this case. Then I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading and charterparties as in policies of insurance. I repeat my illustration: if underwriters paid this loss as through a peril of the sea, how would they, in the name of the assured, claim from the shipowner, because it was not a peril of the sea? I do not go through the cases; I say there is none opposed to this opinion. The doubt or hesitation expressed in the case where the ship was sunk by being fired into is certainly a doubt the other way, but only a doubt.

An attempt was made to shew that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument, that if so, striking on a sunken rock, on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence.

No question of negligence exists in this case. The damage was caused by the sea in the course of navigation with no default in any one. I am, therefore, of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading, that Lopes L.J. was right, and that the judgment must be reversed.

LORD FITZGERALD:—

My Lords, the damage to a portion of the cargo of rice carried by the defendants' ship was not occasioned, either remotely or immediately by any negligence of the defendants as alleged in the statement of claim, but they may nevertheless be liable, and the real question is, whether the defendants have established

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that it arose from a peril of the sea coming within the exception contained in the charterparty and in the bill of lading. I agree with my noble and learned friend opposite (Lord Watson) that the exception "peril of the sea" has the same meaning whether it occurs in a marine policy or in a charterparty or bill of lading, and is to be so interpreted, but that when the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of ascertaining whether the remote cause may not have been the negligence of the carrier, and indeed the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity. Thus, for instance, if a ship is cast on the rocks by force of the winds or sea, that is a loss by a peril of the sea within the exception, but in an action against the carrier it would be open to consider whether the ship being placed in that position did not originate in negligent navigation.

At the close of the argument I was slightly inclined to the opinion that the loss in question might be more accurately described as arising from a peril of the ship than caused by a peril of the sea, but on consideration of the very careful and elaborate judgments in the Court of Appeal and the authorities referred to, and looking at the reason of the thing, I have come to a conclusion in accord with that announced by my noble and learned friends, adopting the reasons and the decision of Lopes L.J.

The accident was fortuitous, unforeseen, and actually unknown until the ship reached her destination and commenced unloading. I do not, however, mean to suggest that to constitute a peril of the sea the accident or calamity should have been of an unforeseen character.

The remote cause was in a certain sense the action of the rats on the lead pipe, but the immediate cause of the damage was the irruption of sea-water from time to time through the injured pipe caused by the rolling of the ship as she proceeded on her voyage.

There having been no negligence on the part of the defendants, I am of opinion that they have brought the case within the exception, and are protected.

LORD HERSCHELL:—

My Lords, I have so recently expressed, in the case of *Wilson* v. *Owners of Cargo per the Xantho* (1), my views upon the interpretation to be put upon the words "dangers and accidents of the seas," occurring in a bill of lading, that I need trouble your Lordships with but few observations in this case.

I take the facts to be, that the damage occurred by the sea entering through a leak caused by rats, without any neglect or default on the part of the shipowner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. In saying so, I am differing from the ground upon which two of the learned Judges in the Court of Appeal, Bowen and Fry L.JJ., based their judgment. But when those learned judges say that "it was consistent with all the findings that the mischief done to the pipe and the incursion of sea-water which followed would never have happened but for either a defect in the condition of the ship or some want of providence in the shipowner," I think they overlook the course which the case took at the trial. It was suggested during the trial by the learned counsel for the plaintiffs that due care had not been taken to exclude or exterminate the rats, and that if the pipe had been made of some other material the accident would not have happened. But I think these points were distinctly and unequivocally abandoned by him. If intended to be insisted upon, they raised questions upon which the opinion of the jury ought to have been taken, and with the assent of the plaintiffs' counsel the only questions put were upon a totally different point. The Master of the Rolls rested his judgment altogether upon another ground. He considered that the rats were the real cause of the damage, and that it was therefore not due to a danger or accident of the seas.

I quite concur with the view expressed in *Laveroni* v. *Drury* (2) that injury done to a vessel or its cargo by rats is not damage by perils of the sea. But in that very case Pollock C.B. said: "If indeed the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea damage." The Master of the Rolls says that the

(1) Ante, p. 503. (2) 22 L. J. (Ex.) 2.

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distinction is a very fine one between damage done by rats which, it may be, so eat into the timbers of a ship as to render it unfit to proceed to sea, and the loss of the vessel owing to the incursion of water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that Pollock C.B. shared this view.

It has been held in the United States, in the case of *Garrigues* v. *Coxe* (1), that a leak occasioned by the eating of rats, without negligence on the part of the shipowner, was a risk covered in a marine policy by the words "perils of the seas." Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated. And inasmuch as it was not the result of any act or default on the part of the shipowner or his crew, I think, for the reasons I have given in my opinion in the case already alluded to, that it is within the exception in the bill of lading. I accordingly concur in the motion which has been made.

LORD MACNAGHTEN:—

My Lords, I agree. The goods which were carried under the bill of lading were damaged during the voyage by the incursion of sea-water. The water came in through a hole gnawed by rats in a pipe connecting the bath-room with the sea. At the trial various charges and suggestions were made of negligence on the part of the shipowner. But they were all either withdrawn or negatived by the jury. Under these circumstances it seems to me that the accident which caused the damage was one of the excepted perils or accidents and that there is no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care.

I agree therefore with the judgment of Lopes LJ. I do not think the case could be summed-up better than it was by him in

(1) 1 Binney, Penn., 592.

the words which have already been quoted: "Sea damage occurring at sea and nobody's fault." I concur in the motion which has been made.

Order appealed from reversed; judgment of Lopes L.J. restored; the respondents to pay to the appellants the costs in both Courts below, and of the appeal to this House: cause remitted to the Queen's Bench Division.

Lords' Journals 14th July 1887.

Solicitors for appellants: *W. A. Crump & Son.*
Solicitors for respondents: *Hollams, Son & Coward.*

[HOUSE OF LORDS.]

BLACKBURN, LOW & CO. . . . . APPELLANTS;

AND

THOMAS VIGORS . . . . . RESPONDENT.

Insurance (Marine)—Concealment of Material Facts—Principal and Agent—Concealment by Agent through whom Policy not effected.

The plaintiffs instructed a broker to re-insure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a re-insurance for £800 through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith:—

Held, reversing the judgment of the Court of Appeal and restoring the judgment of Day J. (17 Q. B. D. 553), that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700.

Fitzherbert v. *Mather* (1 T. R. 12); *Gladstone* v *King* (1 M. & S. 35); *Stribley* v. *Imperial Marine Insurance Company* (1 Q. B. D. 507); *Ruggles* v. *General Interest Insurance Company* (4 Mason, 74; 12 Wheaton, 408); and *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. 511) commented on.

APPEAL from the Court of Appeal.

The facts are stated in the judgments of Lord Esher M.R. and Lindley L.J. (1) The following outline will suffice for this report.

(1) 17 Q. B. D. 553.

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The appellants having brought an action against the respondent upon a policy of re-insurance subscribed by him for £50, claiming for a total loss by perils of the sea, the substantial defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

At the trial before Day J. and a special jury in July 1885 the following facts were proved or admitted.

The plaintiffs, underwriters and insurance brokers at Glasgow, had underwritten the steamship *State of Florida* for £1500, the policy having been effected by the usual brokers for the ship, Rose, Murison & Thomson, who were underwriters and insurance brokers in Glasgow. The ship had left New York on the 11th of April 1884 bound for Glasgow where she was due about the 24th or 25th. On the 30th the plaintiffs tried to re-insure through their London brokers Roxburgh, Currie & Co., but the terms asked were higher than the plaintiffs would give. On the next day, May 1st, the plaintiffs asked Rose, Murison & Thomson to effect a re-insurance for £1500 at fifteen guineas through Rose, Thomson, Young & Co., the London agents of Rose, Murison & Thomson. The latter telegraphed accordingly to Rose, Thomson, Young & Co. After the telegram and before any answer came Murison a member of the firm of Rose, Murison & Thomson became aware of certain facts concerning the ship which were material to the risk, but these facts were never communicated to the plaintiffs or to Roxburgh, Currie & Co. After learning these facts Rose, Murison & Thomson received the following answer to their telegram; "Twenty guineas paying freely and market very stiff; likely to advance before day is out." This answer they shewed to the plaintiffs, and then sent in the plaintiffs' names the following telegram to Rose, Thomson, Young & Co., "Pay 20 guineas." The answer to this was sent direct to the plaintiffs, who ultimately re-insured for £800 at 25 guineas through Rose, Thomson, Young & Co. This was not the policy sued on.

On the 2nd of May the plaintiffs through Roxburgh, Currie & Co. effected a policy of re-insurance for £700 at 30 guineas lost or not lost. This was the policy sued on. The ship had in fact

been lost some days before the plaintiffs tried to reinsure. It was admitted that the plaintiffs and Roxburgh, Currie & Co. acted in good faith throughout.

The jury having been discharged by consent Day J. gave judgment for the plaintiffs for the amount claimed.

The Court of Appeal (Lindley and Lopes L.JJ., Lord Esher M.R. dissenting) reversed this decision and gave judgment for the defendant.

Against this judgment the plaintiffs appealed.

April 28, 29. Sir *C. Russell* Q.C. and *Hollams* for the appellants:—

The decision of the Court of Appeal was wrong because the material information was not known either to the plaintiffs or to anyone who was their agent to effect the insurance in question, or whose knowledge was the knowledge of the principal. The knowledge of Rose, Murison & Thomson was not the knowledge of the plaintiffs so far as the insurance in question was concerned. Concealment of a material fact by the agent through whom the policy is effected avoids the policy, and so will concealment by some other agents: but no case decides that concealment by every agent avoids. The agent must be the master of the ship, or the agent at the port where she is, or in a similar position. He must be in control of and in direct relation to the subject-matter: the alter ego of the principal; an "habitual," a "general" agent;—expressions used in the various authorities. Here the agent was not the "habitual" or "general" agent, and he did not effect the policy. To sustain the judgment the respondent must contend that the broker is bound to send his principal every rumour he hears, for which proposition there is no authority. The cases of *Fitzherbert* v. *Mather* (1), *Gladstone* v. *King* (2), and *Proudfoot* v. *Montefiore* (3), are discussed and exposed in the judgment of Lord Esher (4). If their effect is what was supposed by the Court of Appeal they are contrary to principle and may be overruled in this House. *Stribley* v. *Imperial Marine Insurance Company* (5) only followed *Gladstone* v.

(1) 1 T. R. 12.
(2) 1 M. & S. 35.
(3) Law Rep. 2 Q. B. 511.
(4) 17 Q. B. D. 553.
(5) 1 Q. B. D. 507.

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King (1). Whether the decision of Story J. or of the Court in Error was the right one in *Ruggles* v. *General Interest Insurance Company* (2) the case does not throw much light on the present point. The question is also discussed in 1 Phillips Ins. ss. 531, 543 and in 2 Duer Mar. Ins. Lect. 13, Part 1, ss. 23–32, pp. 413, 427.

Sir *R. Webster* A.G. and *J. Gorell Barnes* for the respondent:—

It is a condition of the contract of insurance that there is no misrepresentation or concealment either by the assured or anyone who ought, as a matter of business or fair dealing, to have disclosed the material facts. The plaintiffs having been left in ignorance of the material facts by their agents whose duty it was to inform them cannot take advantage of a concealment without which the insurance could not have been effected. The material facts became known to Rose, Murison & Thomson while acting as the plaintiffs' agents to reinsure their whole line. Murison went on acting as the plaintiff's agent after he knew those facts; and so long as an agent acts he is bound to communicate material facts to his principal. On what ground is the policy for £800 different from that for £700? A distinction is attempted to be drawn between a risk sought to be covered and one not sought to be covered, but the risk was indivisible, though split up into different policies. No part of the risk was insured when Murison knew the facts. He by his London agents did effect an insurance on part on May 1, which was vitiated by his knowledge. How can the principal validly insure the remainder the next day? To vitiate the contract fraud is not necessary: whether the misrepresentation or concealment be the result of ignorance, mistake or misadvertence, whether it be intentional or accidental, the result is the same: 2 Duer Mar. Ins. Lect. 1 3 Part 1, ss. 3, 23, pp. 381, 415; 1 Phillips Ins. ss. 543, 549, 562, 564; 1 Arnould Mar. Ins. (4th ed.) pp. 481, 490. The duty to communicate is equally binding whether the agent be the habitual or general agent or not. Where two innocent persons contract the loss must fall on him who trusted the person who knew the truth. [They also discussed at length the above cases, and Lord Macnaghten

(1) 1 M. & S. 35. (2) 4 Mason, 74; in error, 12 Wheaton, 408.

referred to *Wyllie* v. *Pollen* (1), per Lord Westbury on the subject of constructive notice to a principal.]

Hollams for the appellants in reply cited 2 Duer Mar. Ins. p. 788.

The House took time for consideration.

Aug. 9. LORD HALSBURY L.C.:—

My Lords, in this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the statement of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent, who did not effect the policy, at an earlier period received information, admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate.

Day J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed Day J.'s judgment, and held that the non-disclosure was fatal to the plaintiffs' claim.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which I think it is inapplicable. Lindley L.J. says, I think correctly: "It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him or to *the* underwriter for him (2)." And Lopes L.J. after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his

(1) 32 L. J. (Ch.) 782.

(2) 17 Q. B. D. 578.

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agent employed to obtain the insurance as if he had acquired it himself (1). To the propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment "agent employed to obtain the insurance," or in the other judgment the words "*the* underwriter," import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, and which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough in *Gladstone* v. *King* (2), I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 5th of October. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which upon a policy lost or not lost assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says: "No mischief will ensue" (a somewhat strange mode of enunciating a proposition of law) "from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience." Unfortunately his Lordship does not state what is the principle which he apparently admits to be new. I can quite understand that when a man comes for an insurance upon his ship he may be expected to know

(1) 17 Q. B. D. 579.

(2) 1 M. & S. 35.

both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others,—his captain, or his general agent for the management of his shipping business,—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C.J. in *Proudfoot* v. *Montefiore* (1). A part of the proposition is "that the insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have knowledge." I think these last are the cardinal words and contemplate such an agency as I have described above. I am unable however to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance. While so employed he receives material information—he does not effect the insurance and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all

(1) Law Rep. 2 Q. B. 511, 521.

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respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In *Fitzherbert* v. *Mather* (1) the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone* v. *King* (2) the master of the ship was the agent; and in *Proudfoot* v. *Montefiore* (3) the agent was the accepted representative of the principal, in effect trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles* v. *General Insurance Co.* (4) before the Supreme Court of the United States may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct, but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

What then is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

(1) 1 T. R. 12.
(2) 1 M. & S. 35.
(3) Law Rep. 2 Q. B. 511.
(4) 12 Wheaton, 408.

He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but, from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day J. restored; and I move your Lordships accordingly.

LORD WATSON:—

My Lords, this is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the Lord Chancellor, that the appeal ought to be allowed.

It is, in my opinion, a condition precedent of every contract of marine insurance that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent, the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good ground for avoiding the contract.

In the case of insurance by a shipowner, it has been decided

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that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master and ship-agents, whose special function it is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the shipowner before the insurance was effected. Accordingly if a master or ship-agent, whether wilfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract.

I do not think it necessary to notice in detail the authorities which bear on this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the Court in *Gladstone* v. *King* (1) and *Stribley* v. *Imperial Marine Insurance Company* (2) held that the innocent non-communication of a material fact by an agent who was the alter ego of the shipowner merely created an exception from the policy. In both these cases the Court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which during the period of his employment became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of re-insurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract.

I am of opinion, with your Lordships, that the responsibility of an innocent insured for the non-communication of facts which

(1) 1 M. & S. 35. (2) 1 Q. B. D. 507.

happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship-agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So, also, when an agent to insure is brought into contract with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing.

In the circumstances of this case I have come to the conclusion that whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of the 1st of May 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an express or implied duty to communicate their own information to their principal: but nothing of that sort occurs here. I must in fairness to Mr. Murison say that I can find no warrant for the inference of fact drawn by Lindley L.J. that he purposely omitted to impart his knowledge to the appellants, in order that they might re-insure on more favourable terms. No such imputation was made at the

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trial; and, if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it.

I concur therefore in the judgment which has been moved.

LORD FITZGERALD:—

My Lords, in this very interesting case I concur in the order which will presently be proposed by my noble and learned friend the Lord Chancellor. I adopt entirely the reasons which have been given by the Lord Chancellor and by my noble and learned friend opposite (Lord Watson). The judgment delivered by the Master of the Rolls was one of more than usual ability—it was a considered judgment, prepared with care and upon a critical examination of the authorities; and I am prepared to adopt that judgment and substantially the reasons given by the noble and learned Lord for the conclusion at which he arrived, though not every portion of those reasons.

LORD MACNAGHTEN:—

My Lords, I agree.

It has frequently been said by eminent judges that the doctrine of constructive notice ought not to be extended. It seems to me that the decision under appeal involves a great and a dangerous extension of that doctrine.

There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time and might in the ordinary course of things have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal. But that is not because the knowledge of the agent

is to be imputed to the principal but because the agent of the assured is bound as the principal is bound to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication: *Lynch* v. *Dunsford* (1).

It was argued that in the present case Murison was under a legal obligation to communicate to the appellants the knowledge which he acquired while employed as their agent. But the learned counsel for the respondent produced no authority for that proposition, nor did they, I think, satisfy your Lordships that such an obligation flowed from Murison's employment. The majority of the Court of Appeal say that whether there was a legal obligation on the part of Murison or not there was a moral obligation on his part to communicate this information to his employers. But I apprehend that it is not the function of a Court of Justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. Whatever may be thought of Murison's conduct from a moral point of view, it would, in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally though not legally bound to communicate to them.

Order appealed from reversed; judgment of Day J. restored; respondent to pay to the appellants the costs both here and below; cause remitted to the Queen's Bench Division.

Lords' Journals 9th August 1887.

Solicitors for appellants: *Hollams, Son & Coward.*
Solicitors for respondent: *Waltons, Bubb & Johnson.*

(1) 14 East, 494.

[HOUSE OF LORDS.]

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LORD ADVOCATE . . . . . Appellant;

AND

YOUNG . . . . . Respondent.

NORTH BRITISH RAILWAY COMPANY. Appellants;

AND

YOUNG . . . . . Respondent.

(Conjoined Appeals.)

Sea-shore — Crown Property — Bounding Charter — "With pertinents" — Prescriptive Title — Beneficial Possession — Acts of Ownership — Drift Sea-ware — Act of 1617, *c.* 12, *and* 37 *&* 38 *Vict. c.* 94, *s.* 34.

The pursuer brought an action to establish his title as against the defenders and the Crown to the foreshore of the sea ex adverso land of which he was the proprietor. He claimed under a grant of feu made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to shew that the grantor had an express title from the Crown. He, however, endeavoured to establish his right to the foreshore by prescriptive possession following on his own title, and, inter alia, adduced evidence to shew that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he and his predecessors had taken stone and sand from the shore; and that they and their tenants had exclusively carted away the drift sea-ware. The Crown on the other hand adduced evidence to shew that stones and sand were taken from the shore to build a harbour, and that the villagers had carried away in creels drift sea-ware:—

Held, affirming the decision of the Court of Session, that, notwithstanding the absence of an express title in the superior, the pursuer had given sufficient proof that he and his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617, c. 12, and the Act of 37 & 38 Vict. c. 94, by virtue of their heritable infeftments, and that he had consequently a valid right of property in the solum of the foreshore as against the Crown.

Conjoined appeals from an interlocutor of the Second Division of the Court of Session, Scotland (1). The appellants are, the Lord Advocate, as representing the Crown and the Board of

(1) 13 Court of Sess. Cas. 4th Series, 314; 23 Scot. L. R. 196.

Trade, and the North British Railway Company. The respondent is Mr. Young, proprietor of the lands of Colinswell Park, situate on the shore of the Firth of Forth, near Burntisland.

The appellants, the North British Railway Company, obtained by various Acts of Parliament authority to construct a railway between the Forth Bridge railway line near Inverkeithing, and the North British line near Burntisland. For this purpose it became necessary to obtain a portion of the foreshore ex adverso the respondent's lands of Colinswell Park, and the North British Railway Company proceeded to treat with the Crown, as presumably the proprietor. They served no statutory notice upon the respondent. By feu-charter, dated the 1st, and recorded the 15th of October, 1884, the Board of Trade, as representing the Crown, sold to the North British Railway Company certain pieces of ground, including the foreshore in question. On the 16th of February, 1885, the respondent raised an action against the North British Railway Company, and also against the Crown, to have it found that the foreshore ex adverso his lands of Colinswell belong exclusively to him in property, subject to the rights of navigation and other public uses thereon, and to have the North British Railway Company interdicted from entering upon any part of the foreshore so claimed by him.

The respondent's title-deeds describe his property as "all and whole that park or enclosure of land called Colinswell Park, described in the title-deeds thereof as consisting of 22 A. and 3 R. Scots measure, with the pertinents, as sometime possessed by John Young, baker in Burntisland, bounded on the south by the sea, the lands of Newbigging on the west, the lands of Gedsmiln on the east, and the high road leading betwixt Aberdour and Burntisland on the north parts." The respondent's ancestor, William Young, acquired the property from William Wemyss of Cuttlehill, by virtue of a feu-charter, dated 7th November, 1804, on which the said William Young was infeft, conform to instruments of sasine, dated 13th of June, and recorded in the particular register for the county of Fife, 29th of July, 1809.

There were subsequent infeftments in 1819 and 1860. The respondent produced no evidence of his superior's title; but he produced the Crown charter to the adjoining lands of Newbigging

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which was so expressed as to carry the foreshore ex adverso of that estate.

The bay upon which Colinswell is situate is a comparatively narrow inlet with a bottom composed of sand and mud; some considerable extent of shore being dry at low water. No sea-weed grows on the shore; but large quantities are driven in by each tide. In the proof adduced the material facts of possession of the shore relied on by the respondent were: that his predecessor had built a wall about 1827, which cut off a portion of the shore, and had also built a bathing-box partly upon the wall and partly upon the shore; that respondent and his predecessors had taken stones and sand from the shore whenever they required them; that they and their tenants had exclusively exercised the right since 1825 of daily carting away for manure all the drift sea-ware or weed cast up by the sea; and that when storms occurred they drew off the shore thirty or more cart-loads a day. In 1849 the respondent's predecessor built along the line of the wall a carriage-road, and in 1854 the public successfully maintained a right of footway over this road (1); but no stranger's cart could get on to the sea-shore by this road without committing a trespass.

The adverse or concurrent possession alleged for the appellants was that the public did all the acts, except building the wall and bathing-box, which the respondent founded upon: namely, that they took stone and clay in 1857, 1875, 1882, for harbour works at Burntisland; that the villagers carried away in creels drift sea-ware, and that the public did such minor acts as bathing, gathering sea-shells and shooting sea-fowl. It was however proved that the stone and clay for the harbour works were taken away seawards in boats, and that the taking was not confined to the sea-shore opposite Colinswell, but ranged over a large extent of coast.

On the 15th of July, 1885, the Lord Ordinary (Lord Fraser) held that the respondent had failed to prove exclusive possession

On a reclaiming note the Second Division, on the 8th of December, 1885, recalled the Lord Ordinary's judgment and

(1) 14 Court of Sess. Cas. 2nd Series, 300, 375, 465; affirmed on appeal, 1 Macq. 455.

declared in favour of the respondent, and granted the interdict asked for.

On appeal,

April 21, 22, 25, 26, 28. *The Lord Advocate* (*Macdonald*, Q.C.), (with him *The Solicitor-General for Scotland* (*Robertson*, Q.C.), and *Vaughan Hawkins*), for the Crown:—

So far from the respondent's titles being followed by constant and exclusive possession of the sea-shore claimed, nearly all the acts of possession founded on by the respondent, except the building of the retaining wall, were also done by the public. The inference to be drawn from the erection of the wall is very weak, there being no interest in the public or the Crown to prevent it. Carting away the drift sea-ware by itself cannot establish a right to the foreshore, because such acts are more calculated to support a right of servitude than a right of property: *Earl of Morton* v. *Covingtree* (1); *Fullerton* v. *Baillie* (2); *Baird* v. *Fortune* (3).

[LORD WATSON referred to *Erskine* v. *Magistrates of Montrose* (4); *Paterson* v. *Marquis of Ailsa* (5).]

Lord Saltoun v. *Park* (6) and *Lord Advocate* v. *Agnew* (7) do not apply, as they were barony cases; but in *Lord Advocate* v. *Agnew* Lord Cowan said: "Crown charters, which are de facto sea bounded, though the title does not contain a boundary by the sea, carry with them as parts and pertinents certain privileges or servitude rights in relation to the adjoining shore." (8) Lord Benholme in the same case was of opinion that the enjoyment of mere waif and stray cast upon the shore was a much less important right than the right of cutting from the rocks the sea-ware (9). As to the value of each act of possession: see Lord Blackburn in *Lord Blantyre* v. *The Lord Advocate* (10): "No one

(1) June 20, 1760; Mor. 13,528.
(2) July 16, 1697; Mor. 13,524.
(3) April 25, 1861; 21 Court of Sess. Cas. 2nd Series, 848; reversed on appeal, 4 Macq. 127.
(4) Hume, 558; Mussel and lug bait case.
(5) March 11, 1846; 8 Court of Sess. Cas. 2nd Series, 752.
(6) Nov. 24, 1857; 20 Court of Sess. Cas. 2nd Series, 89.
(7) January 21, 1873; 11 Court of Sess. Cas. 3rd Series, 309; 45 Scot. Jurist, 214; 10 Scot. L. R. 229.
(8) January 21, 1873; 11 Court of Sess. Cas. 3rd Series, at p. 327.
(9) Ibid. at p. 331.
(10) June 19, 1879; 6 Court of Sess. Cas. 4th Series (H.L.) at p. 85; 4 App. Cas. at p. 791.

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such act is conclusive, and the weight of each act depends upon the circumstances; one very important circumstance as to the weight being, whether the act was such and so done, that those who were interested in disputing the ownership would be aware of it:" see also Bayley, J., in *Dickens* v. *Shaw* (1). *Buchanan and Geils* v. *The Lord Advocate* (2), is the case most like this; but there the claimant proved sale of the soil and sand taken from the foreshore; that he had reclaimed part, fenced other parts; had erected a pier, and had driven off all trespassers. These are acts different from what was proved here, and absolutely inconsistent in their nature with a servitude right. In *Attorney-General* v. *Mayor of Portsmouth* (3), Lord Bramwell agreed with Bayley, J., in *Dickens* v. *Shaw* (1).

[LORD HALSBURY, L.C.:—That case was eventually compromised.]

Balfour, Q.C. (with him *Asher*, Q.C.), for the appellants, the North British Railway Company:—

The description of the properties as a park or inclosure "bound by the sea" must be taken to mean not the sea at low water, but when it comes up to the inclosure, that is at high water. Undoubtedly the words "with pertinents" are potential, and may support a claim of property, if explained by prescription.

[LORD WATSON referred to *Smart* v. *Magistrates of Dundee* (4), *Berry* v. *Holden* (5), and *Campbell* v. *Brown* (6), as good expositions of what is a bounding charter.]

The use must be such as is attributable to property, and not to any subservient right, because until the title is made by prescription it is necessarily in suspense. The acts of ownership must be such as to warn the Crown to protect its rights. As to building the wall, even if it did cut off a portion of the foreshore, it did not appropriate the whole, as the part cut off was not of the same kind and quality as the rest, and the

(1) Reported in Hall on the Sea-shore, Appendix LXV.

(2) July 20, 1882; 9 Court of Sess. Cas. 4th Series, 1218; 19 Scot. L. R. 842.

(3) Not reported.

(4) 22 Nov. 1797; 3 Pat. App. 606.

(5) 10 Dec. 1840; 3 Court of Sess. Cas. 2nd Series, 205.

(6) 18 Nov. 1813; 17 F. Coll. 444.

appropriation was not of such an extent as to which the attention of the Crown would be called. In *Rex* v. *Commissioners of Sewers for Pagham* (1) it was held that every landowner has a right to protect his land from the encroachment of the sea; and if the building of a protecting or retaining wall is an incident of raparian ownership, doing that cannot give a proprietary right to the foreshore. Drift sea-ware is not pars soli, and therefore removing it cannot be considered as dealing with the solum as proprietor.

[LORD FITZGERALD referred to *The Queen* v. *Clinton* (2), where it was held that ungathered sea-weed cannot be the subject of larceny.

Sir *H. Davey*:—But an action for trover will lie at the suit of the owner of the shore: *Healy* v. *Thorne* (3); *Brew* v. *Haren* (4).]

The Crown cannot be divested by acts of possession not different from those which the public are doing; and if the Crown has tolerated possession by the public the presumption of an implied grant of the shore to the respondent is negatived. No doubt the respondent's title was registered, but the Crown cannot be expected to make a search to see if any person has given a grant including the foreshore.

Sir *Horace Davey*, Q.C., and *C. J. Guthrie* (of the Scotch Bar), for the respondent:—

In the law of Scotland, where property is described as being bound by the sea, the "sea" means the sea at low water, and such a title followed by infeftment forms a foundation for prescriptive possession: *Officers of State* v. *Smith* (5); *The Lord Advocate* v. *Sinclair* (6); *Culross* v. *Geddes* (7); Lord Gillies

(1) 8 B. & C. 355; Hall on Seashore, 167. See the contrary as to flood from a river: *Menzies* v. *Breadalbane*, 3 Wils. & Shaw, 235. See as to rightfully removing gravel, interdicted as causing danger of flooding to another's land: *Attorney-General* v. *Tomline*, 1880, 14 Ch. D. 58.

(2) 1869. Ir. R. 4 C. L. 6.

(3) 1870. Ir. R. 4 C. L. 495.

(4) 1877. Exch. Ch. 11 Ir. R. C. L. 198. See also *Howe* v. *Stawell*, Al. & N. 348.

(5) 11 March, 1846; 8 Court of Sess. Cas. 2nd Series, 711; affirmed on appeal, 6 Bell, Ap. 487.

(6) 21 June, 1865; 3 Court of Sess. Cas., 3rd Series, 981; 1 Sco. App. 174.

(7) 24 Nov. 1809; Hume, 554.

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in *Macalister* v. *Campbell* (1); *Buchanan & Geils* v. *The Lord Advocate* (2). There are here acts of ownership sufficient not only to explain the respondent's title but to support the inference that the pursuer's predecessors possessed a Crown title to the foreshore. Then the title was recorded, which in itself was a public assertion of the right of property in the foreshore; and when the owners of Colinswell were seen doing acts on the foreshore consistent with their recorded deeds everybody, including the Crown, must be considered to have notice that they claimed the property therein. Lord Blackburn said in *Lord Blantyre* v. *The Lord Advocate* (3): "Every act shewn to be done on any part of that tract (of foreshore) by the Barons of Blantyre or their agents, which was not lawful, unless the Barons were owners of that spot on which it was done, is evidence that they were in possession as owners of that spot on which it was done." Hale, C.J., said in *De Jure Maris* (4): "Constant and usual fetching gravel and sea-weed and sea sand between high and low water mark and licensing others to do so; inclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wreck happening on the sand, &c.," are evidence of ownership. This passage has been cited in Scotland as Scottish law; Lord Cowan in *Agnew* v. *The Lord Advocate* (5).

[LORD HALSBURY, L.C., referred to *Duke of Beaufort* v. *Mayor of Swansea* (6).]

Agnew v. *The Lord Advocate* (7) is the only case in which a distinction is drawn between the right of taking "cut" and "drift" seaweed. In *Blundell* v. *Cotterall* (8) it was decided that a member of the public has no right to take wheeled carriages upon the sea-shore. That case shews that the using of carts by the respondent to take away the drift sea-weed is evidence of property and not of a mere servitude. The appellants contended that the respondent had not complete possession, as he did not make merchandise of the

(1) 7 Feb., 1837; 15 Court of Sess. Cas. 1st Series, at p. 493.

(2) 20 July, 1882; 9 Ibid. 4th Series, 1218.

(3) 4 App. Cas. at p. 791.

(4) Hargrave's Tracts, p. 27.

(5) 11 Court of Sess. Cas. 3rd Series, at p. 328.

(6) 3 Ex. 413.

(7) 11 Court of Sess. Cas. 3rd Series, 309.

(8) Nov. 7, 1821; 5 B. & Ald. 268.

clay and stones. But the character of possession here was such as the subjects would admit of. The foreshore cannot be absolutely private, nor can possession of every part be taken. The possession proved was what would reasonably be expected, namely, such ordinary possession and beneficial enjoyment as a proprietor would exercise dealing with the sea-shore as his own property: see The Lord Ordinary in *The Lord Advocate* v. *McLean* (1). The respondent's knowledge of villagers taking away sea-ware in creels or barrows is not proved; but even then, adverse possession must be by some person who has a title upon which he can found possession in order to make it of any value: Lord Cottenham in *Neilson* v. *Cochrane* (2). The appellants placed some reliance upon the fact that the respondent's titles give a certain measurement; but in bounding charters, the measurement given is merely designative and not taxative: *Hunter* v. *The Lord Advocate* (3).

The Lord Advocate, in reply.

Time having been taken judgment was delivered as follows:—

LORD WATSON:—

My Lords, the respondent and his predecessors in title have been infeft since 1809 in the lands of Colinswell, lying on the north shore of the Firth of Forth, under a charter from a subject superior, dated the 5th and 7th of November, 1804, in which, as well as in their successive infeftments, the subjects are described as a park or inclosure, consisting of 22 acres and 3 roods, Scots measure, with the pertinents, "bounded by the sea on the south." The measurement applies exclusively to the park or inclosure: the boundary includes not only the park or inclosure. but "the pertinents," an expression which may aptly include the solum of the shore between high and low water-mark. I can therefore, see no reason to doubt that the learned judges of the Second Division, in holding that his title gives, or purports to

(1) July 20, 1866; 38 Jur. 584.
(2) 1 Rob. Ap. at p. 93. See *Pirie* v. *Rose*, Feb. 1 1884, 11 Court of Sess. Cas. 4th Series, 490.
(3) 7 Court of Sess. Cas. 3rd Series, 899; *Fleming* v. *Baird*, 3 Court of Sess. Cas. 2nd Series, 1015; *Ure* v. *Anderson*, 12 Court of Sess. Cas. 1st Series, 494; *Rochead* v. *Borthwick*, Mor. 2264.

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give, to the respondent a right per expressum to the foreshore ex adverso of his land, followed the settled rule of the law of Scotland, which was thus expressed by Lord Glenlee in *Campbell* v. *Brown* (1): "When a landholder is bounded by the sea, it is true he has a bounding charter. But it is a boundary moveable and fluctuating suâ naturâ; and when the sea recedes, he must be entitled still to preserve it as his boundary. The shore is indeed still publici juris; but when the sea goes back, the shore advances, and the proprietor is entitled to follow the water to the point to which it may naturally retire, or be artificially embanked."

In any question with the superior who granted the charter of 1804, and his successors, the respondent and his predecessors have all along had a preferable right to the foreshore; but the charter cannot avail him in a question with the Crown, unless he can shew that his superiors had an express right to the foreshore derived from the Crown. No evidence has been produced of the superior's title, and the charter of 1804 must consequently be taken to have proceeded a non habente potestatem. But, notwithstanding the defect of the superior's title, the Act, 1617, c. 12 gives the respondent a valid right against the Crown, if he can prove that he and his predecessors have, by virtue of their infeftments, had continuous possession of the foreshore, without lawful interruption, for the period of forty years, which has been reduced to twenty years by sect. 34 (37 & 38 Vict. c. 94) of the Conveyancing (Scotland) Act, 1874.

The only substantial question raised by this appeal is, whether the respondent has proved, in point of fact, that the foreshore has been possessed by the proprietors of Colinswell for the prescriptive period, by virtue of their heritable infeftments? Counsel for the appellants did not dispute that the respondent's title affords a good basis of prescription; but they maintained, that although his title is capable of being explained by possession, so as to include the right of foreshore, it does not expressly give him that right. The only material distinction in a question like the present between an express title from a subject superior, and a title not express, but susceptible of explanation, appears to me to consist in this, that there are certain acts of possession, in

(1) 18th of November, 1813: 17 Fac. Coll. at p. 447.

relation to the foreshore, which might, in the latter case, be attributed to a mere servitude (and would therefore be consistent with the property remaining in the Crown), but which must, in the case of an express title, be ascribed primâ facie to a right of property in the subject.

It is, in my opinion, practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigators and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed, that in cases where the seashore admits of an appreciable and reasonable amount of beneficial possession, consistently with these rights, the riparian proprietor must be held to have had possession, within the meaning of the Act 1617, c. 12, if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.

Upon the question of fact raised by the evidence in this case, I have come to the same conclusion with the Second Division of the Court, and the reasons by which I have been influenced are very clearly stated in the judgment of Lord Young (1). I think the appropriation of part of the seashore since 1827, and the exclusive exercise of the right of taking drift sea-ware, by the respondent and his predecessors, constitute such possession as might have been expected if they had been the grantees of the Crown, and are therefore, taken per se, sufficient to fortify the respondent's title against the claim now made by the Crown.

It was strongly urged by counsel for the appellants that the

(1) 13 Court of Sess. Cas. 4th Series, at p. 324.

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taking of drift sea-ware is not in itself a sufficiently definite act of possession, and that, at all events, it ought to be referred to a right of servitude, and not to a right of property, in the riparian proprietor. I do not doubt that the right of taking such ware may, as they contended, be the subject of a proper servitude; a circumstance which is conclusive of its being incidental to, and part of the property of the foreshore. Why the right ought to be ascribed to servitude, when exercised by a proprietor in virtue of a public sasine, which professedly gives him the property of the foreshore, I confess that I have been unable to understand. With regard to the relative importance of taking loose ware, and the cutting of growing tangle, as acts evidencing proprietary right, I can only say that, in my opinion, it depends not so much upon attachment or non-attachment to the foreshore, as upon the beneficial character of the right. I should certainly consider the exclusive taking of a valuable annual supply of loose ware to be at least as emphatic an assertion of his right of property, by one having an express title to the foreshore, as his taking from it a yearly crop of growing tangle of less value. In the present case it is proved that the drift ware taken by the proprietors of Colinswell and their tenants in their right is of considerable annual value, especially when the extent of the property is taken into account.

The only difficulty which I have felt in considering this case has been in regard to what is sometimes referred to as contraria possessio, but is better described as concurrent possession by members of the public who have no grant or license from the Crown. I attach not the slightest weight to the fact that some old women carried off sea-ware in creels, for the purpose of manuring their gardens, which were not upon the lands of Colinswell. The removal of clay and stones from the foreshore, which is proved to have taken place at three several periods, is a very different matter. These were in no proper sense the acts of the Crown; but acts of that description, although done without title, tend to derogate from the possession of the riparian proprietor, and, if carried far enough will deprive his possession of that exclusive character which is necessary in order to establish a prescriptive right. After careful consideration of the evidence bearing upon

these acts, I am satisfied that they were neither of such extent, nor of such duration in point of time, as to affect the quality of the possession had by the respondent and his predecessors. It seems to be proved that these encroachments by the public (for in any view they were acts of encroachment) were not known to the proprietors of Colinswell; but I do not think the respondent would have benefited by their ignorance if the acts had been more marked in character, or longer continued.

I am accordingly of opinion that, in these appeals, the judgments of the Court below ought to be affirmed with costs, and I move accordingly.

LORD FITZGERALD:—

My Lords, we are bound to determine this appeal by the light of Scotch law deduced from Scotch judicial decisions to which we have been referred and now so well settled as not to be questioned. There seems to have been no difference of opinion between the Lord Ordinary and the judges of the Second Division, that if the feu charter of 1804 had been a royal grant expressed in the same terms it would as interpreted by Scotch law have been sufficient to pass to William Young of Burntisland the exclusive rights which the pursuer now claims.

The grant of 1804 is not a Crown grant, nor was it made by one who is shewn to have derived from the Crown, but on the interpretation of its terms, and especially in the use of the expression "pertinents" (which is of very potent and comprehensive meaning and sufficient by Scotch law to pass every subject in connection with the land which usually goes to the vassal as accessories to the subject expressly granted) it would as between the parties to that instrument have passed to the grantee the sea shore ex adverso the land actually granted.

The grant not being from the Crown, or from one being a grantee of the Crown, though possibly from the evidence it would be practicable to infer a grant from the Crown, it seems admitted on all sides that the onus is cast on the pursuer to shew that he has had for twenty years at least continuously and as of right that quiet and peaceable possession without lawful interruption which

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under the Act of 1617 now protects him from being disquieted by the Crown or any other pretending right.

By possession is meant possession of that character of which the thing is capable. The difference between the Lord Ordinary and the Second Division was one of fact, and I have, but not without some difficulty, adopted the view of the facts and the inferences to be deduced from them propounded by my noble and learned friend.

If the appeal had related to similar rights either in England or in Ireland I would have hesitated much before reaching a conclusion favourable to the pursuer.

LORD HALSBURY, L.C., and LORD MACNAGHTEN stated they had read the opinion of Lord Watson in print and entirely agreed with it, and the grounds upon which it was founded.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 1st August, 1887.

Agents for the Crown: *Walter Murton, Solicitor, Board of Trade, London, for Donald Beith, W.S., agent of the Board of Trade, Edinburgh.*

Agents for the North British Railway Company: *W. A. Loch, for W. White-Millar, S.S.C., Edinburgh.*

Agents for the Respondent: *Grahames, Currey & Spens, for Cowan & Dalmahoy, W.S., Edinburgh.*

[PRIVY COUNCIL.]

GIOVANNA GERA . . . . . PLAINTIFF;

AND

EDUARDO CIANTAR . . . . . DEFENDANT.

J. C.*
1887
Feb. 23, 24, 25, 26; *March* 1; *June* 18.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL OF MALTA.

Law of Malta—Legitimation—Children ex nefario coitu—Jurisdiction—Ordinance of 1814.

By Justinian's Novel 89 legitimation per rescriptum principis was introduced. Children ex nefario coitu though thereby declared incapable were occasionally legitimated by an exercise of Imperial grace.

By the later civil law children of parents free to marry at the time of their conception and birth could be legitimated as a matter of right; children ex nefario coitu only at the discretion of the ruling power and subject to its conditions.

In Malta since it became a British possession the power of legitimation was exercised by the governor until by an Ordinance of the 25th of May, 1814, it passed to the Third Hall of the Civil Court:—

Held, that the law of Malta as to legitimation is to be found in the Code Rohan and Maltese precedents; and only where its provisions fail, in the civil law.

Held, further, that by the Code and precedents the respondent natus ex uxorato et solutâ, and therefore ex nefario coitu, had been duly legitimated by a decree of the Third Hall, and thereby acquired the character and rights of a child legitimus et naturalis so far as permitted by municipal law; entitling him to take under limitations in favour of legitimate and natural children unless a plain intention was expressed to the contrary.

Under the Ordinance of 1814 the Court has jurisdiction in the case of every petition for legitimation which, according to previous practice, would have been referred by the governor to a judge for inquiry and report. Its exercise should be governed by considerations derived from the state of the parent's family and the interests of the child; other persons whose interests may be affected need not be cited, and the Court has no power to attach conditions for their protection.

APPEAL from a decree of the Court of Appeal (Jan. 17, 1883), reversing a decree of the First Hall of Her Majesty's Civil Court (Jan. 2, 1880), in favour of the appellants.

The action was brought by the predecessor of the appellant as attorney of certain persons next of kin to one Paolo Ciantar, and

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR BARNES PEACOCK.

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claiming as devisees under his will to recover possession and mesne profits of certain real estate in Malta which had belonged to him.

The question decided in the appeal is as to the validity and effect of a decree and act of legitimation, dated the 23rd and 25th of August, 1839, whereby the respondent purported to be created the legitimate and natural son of his father, Paolo Antonio Ciantar (himself the legitimated son of Paolo, and constituted his universal heir by his will) as if he had from the beginning been born natural and legitimate.

The facts of the case and the course of the proceedings are sufficiently stated in the judgment of their Lordships.

Upon the question at issue in this appeal the First Court held that it was only natural children; that is, children born of parents between whom at the time of conception marriage is possible; who could be legitimated by ordinary law, either by reason of the subsequent marriage of their parents, or per rescriptum principis. That a child born, as was the respondent, "ex damnato coitu," could not be legitimated under the ordinary law, and that where such children had in fact been legitimated either by the supreme pontiff or secular princes having sovereign authority, or by princes exercising a delegated authority, such legitimation was effected de plenitudine potestatis, and in derogation of laws in force to the contrary, and that the authorities shewed that even this extraordinary power was not exercised so as to prejudice the rights of substitutes, unless the existence and nature of the disposition creating the substitution were fully brought to the knowledge of the legitimating authority. That the municipal law of Malta, chap. i., book iv., sects. 57-60, did not recognise the right of legitimation in the case of adulterine children, and that before the constitution of 1814 there was no power under the ordinary law of legitimating such children, and that by that constitution it was only the ordinary legal powers of the sovereign prince which devolved upon the Court of voluntary jurisdiction, and not the powers which proceeded from the exercise of a grace in the fullness of the sovereign authority with express derogation to the disposition of the law. The Court further held that even assuming the Third Hall to have had power to legitimate the respondent, that Court might, and not improbably would (if it

had been informed of the adulterous quality, and of the entailed property), have so restricted the effect of the legitimation as not to affect the rights of the appellants, and that owing to the fact of the provisions of the will in favour of the next of kin not having been brought to the knowledge of the Court it was not certain that the Court would have proceeded to give the decree without any limitation, and without the clause, "sine præjudicio vocatorum." The Court, therefore, declared that the appellants, as next of kin by blood to Paolo Ciantar, had the right to the possession and free ownership of four-fifths of the real property mentioned in his will; and that the act of legitimation of the respondent and the will of Paolo Antonio Ciantar were of no effect against the rights of the appellants: and decreed consequential relief.

The Court of Appeal held that the expression "legitimate and natural children" in the will of Paolo Ciantar included children legitimated by decree, and that the respondent was legally legitimated so as to entitle him to succeed under the will.

Sir *W. Phillimore*, Q.C., and *Kenelm Digby*, for the appellants, contended that this decree should be reversed, for that the respondent was not a legitimate or natural son of Paolo Antonio Ciantar within the meaning of the will of Paolo Ciantar. The true meaning of "natural" child is a child whose parents were at the time of conception and birth capable of intermarriage; the expression in the will could not therefore apply to the respondent whether he were validly legitimated or not. Then as regards legitimation only two forms were known to the Roman law, (1) per subsequens matrimonium; (2) per rescriptum principis. Justinian by his Novella, 89, c. 9, introduced this latter; the grant being dependent on the will of the parent, the advantage of the child, the non-existence of other legitimate and natural children, the legal possibility of intermarriage of the parents at the time of conception. The princeps however in later times assumed authority to legitimate those who were born ex damnato coitu; but his doing so was in derogation of and not in accordance with law. The respondent was an adulterine bastard, his so-called legitimation was in fact a dispensation, and could only

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be granted by the sovereign authority; whether the civil law or the municipal law of Malta were referred to. Assuming that previous to 1800 the Grand Master, and subsequent to 1800 the British government had such power, it did not pass to the tribunals of Malta under the terms of the Ordinance of May, 1814, or otherwise; and its assumed exercise in this case was ultra vires of the Third Hall and invalid. Further, assuming that the Court had the power of legitimation, it was contended that it extended only to remove the stain and status of illegitimacy, and not to confer rights of succession.

The authorities referred to were Justinian's Inst., book i., tit. 2, sect. 6, and Suarez, De Legibus, book vi., chap. 14; Novella, 89. chaps. 9 and 15; [*Fullarton* objected that this part of the Novella was only accepted in later times as applicable to natural children without abrogating other laws by which the princeps could for special reasons confer legitimacy upon children not coming within that class]; Novella, No. 74, chap. 6. As regards the municipal law, see the Maltese Code, book iv., chap. 1, sects. 57–60 inclusive, and the Ordinance of 1869, tit. 1, chap. 1, sects. 50, 51. Then as to the nature and extent of the powers capable of transfer and actually transferred to the Maltese Courts by the sovereign through proclamations, see Proclamations, Nos. XV. and XVI. of the 25th and 26th of May, 1814. On the jurisdiction of the Ecclesiastical Courts in non-contentious matters, reference was made to Blackstone (ed. 1803), book iii., chap. 5; Voet, book ii., tit. 1, sect. 3, and the case of *Bugeja* v. *Caruana Bugeja*, decided by the Maltese Court the 15th of June, 1881. Various precedents of the Maltese Courts with regard to legitimation were examined, dated from 1837 to 1850, and a collection of Maltese proclamations, p. 54, was referred to. With regard to the power of legitimation of children born ex nefario coitu belonging exclusively to the sovereign power, not capable of delegation, reference was made to the following authorities: Peregrino, de fideicom., art. 23, and subsequent articles, viz., 25, 32, 49, 62, 63, and 66. [*Fullarton* referred to art. 22, n. 87.] Fusario, de Fideicommissariâ Substitutione, part ii., quest. 408, Nos. 141 and 142. See also 18, 27, 28, 29, 32, 85, 106, 175; Cardinal de Lucca, De Fideicommissis, discur. 222, n. 6; disc. 68,

n. 1, 6, 8, 11, 12, 24; disc. 69, n. 9, which latter were mentioned as only advocate's pleadings in a particular case cited by mistake in the Courts below; De Lucca, de Regalibus, book ii., discursus 193, p. 351, n. 14 and disc. 139, n. 9; Torre, de successione in major. et primogen., part ii., quest. 50, No. 25; p. 543; responsum 4; p. 544, n. 38, part i., chap. 28, n. 75, chap. 29, n. 9, 10, 59, and 67. Reference was also made to the preamble of the Code Rohan, which was adopted at the English conquest, and to book i., chap. 8, sect. 37; chap. 9, sect. 27; Voet, ad Pandect. lib. 25, tit. 7, No. 13, and to decisions of the Rota Romana, dec. 310, Recentiorum, tom. 1, par. 18, p. 585, dated June 8, 1674; dec. 673, Rec. tom. 2, p. 450, March 3, 1676; and O. Chacherano, dec. Senatus Pedemontani, dec. 119. Also to *Cini* v. *Abela* (1) and *Sant* v. *Sant* (2).

With regard to the contention on behalf of the respondent that he was not an adulterine bastard because he was born ex solutâ (though ex uxorato) the following authorities were cited: Gabrielis, Palæotus De Nothis et spuriis, chap. 12, Nos. 2, 3 and 5; chap. 16, No. 5 et seq.; chap. 42, Nos. 1, 4, 5; De Castro, vol. 3, fol. 15, cons. 18, No. 2, answered by ibid. vol. 1, cons. 402, No. 1, cf. cons. 34, vol. 2, f. 17; Johannes Petrus Surdus, Dec. Senatus Mantuani, dec. 249, Nos. 1, 3, 19; dec. 249, No. 21; P. Farinacii, Praxis et Theoricæ Criminalis, De delictis carnis, quest. 141, n. 77; Lupus, de illegitimis et de natalibus restitutio, comment. 1, Prec. No. 15, § 5, No. 145; Covarruvias in Epist. de Spons., part ii., chap. 8, § 5, No. 16; Menochius, De Arb. jud. lib. 2, centur. 5, casu 420, No. 106 et seq.; Decius Cons. 288, No. 6.

With regard to the decree and act of legitimation it was further contended that they were ineffective because they had been obtained irregularly. Neither they nor the petition on which they were founded contained any reference to the fact that Paolo Antonio Ciantar was uxoratus at the time of the respondent's conception and birth. That fact was suppressed; also there was no reference to the will of Paolo Ciantar, or to the nature of the interest which Paolo Antonio took thereunder or to the substitution created thereby. Nor were the appellants cited. They ought to have been cited, and the decree should have been sine

(1) Vol. iv. of the Decisions of the Maltese Tribunals, p. 48.

(2) Vol. vii. p. 64. See also Vol. viii. p. 353.

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prejudicio vocatorum. If this decree and act were valid they were not intended to operate so as to confer on the respondent a right of succession under the will, a right to exclude the substitutes mentioned therein. The whole effect was to remove the stain of illegitimacy and to confer on the respondent the right of succession to any property of his father which was not burdened with a substitute.

With regard to the Municipal Law as expressed in the Code Rohan, book iv., chap. 1, sects. 57–60, it was contended that sect. 60 did not apply at all to the so-called legitimation of adulterous children, and that no power of legitimating such children was recognised by the Code: and that if sect. 60 did apply it attached to every act of legitimation the consequence that no prejudice should be caused by the legitimation to persons claiming as substitutes.

Sir *Horace Davey*, Q.C., *Fullarton*, and *Jeune*, for the respondent, were not called upon.

1887 *June* 18.

The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal relates to the right of succession to certain real estate in Malta, under the limitations of a fideicommissum or entail created by the last will and testament of the deceased Paolo Ciantar.

In the year 1801, the testator, who was at that time a married man, had a son, afterwards named Paolo Antonio, born to him by a single woman. The testator had no lawful issue, and in October, 1810, he presented a petition to the Governor of Malta, praying His Excellency to declare his illegitimate child to be his son, "so that the said Paolo Antonio, quibuscumque non obstantibus, to the exclusion of whatsoever person, may succeed to your petitioner ab intestato, or by will, and enjoy all the honours and effects of law and grace." After receiving a favourable report from the civil judge, to whom the application was remitted for inquiry, His Excellency, on the 7th of November, 1810, granted the prayer of the petition. Thereafter, upon the 23rd of November, 1810, the testator executed a formal notarial act, by which, after narrating the procedure which had taken

place, and the fiat of the governor, he accepted and recognised Paolo Antonio as his legitimate son, "giving and granting to the said Paolo Antonio ample, full, and free power and authority to exercise whatsoever acts of such legitimation, and to succeed to his property and rights, either by will or ab intestato, as he de jure might or should succeed if he was born his legitimate and natural son and born of lawful marriage."

The wife of Paolo Ciantar died in January 1812, and on the 30th May of that year he executed the will in question, by which his legitimated son, Paolo Antonio Ciantar was nominated as his universal heir. The testator, however, directed that Paolo Antonio should be a pure and simple usufructuary heir during his lifetime of the hereditary real estates, without the power of disposal either inter vivos or mortis causâ; and that after his death these estates should "go to the children and other descendants, legitimate and natural, of his said son and universal heir." In the event of his son dying without leaving children or other descendants, legitimate and natural, these estates were devised, "free from any entail, to the testator's nearest next of kin according to the rules of succession ab intestato, and not otherwise."

The testator did not long survive the execution of his will; and on his death, Paolo Antonio entered into possession of the hereditary real estates, of which he enjoyed the usufruct until his decease in 1877.

Paolo Antonio was married in 1815 to Carolina Theij, and they had one child, who died in 1818. In the year 1833, during the subsistence of their marriage, he had a son named Eduardo, the respondent in this appeal, by Teresa Izzo, a single woman. In August, 1839, being then without lawful issue, he presented an application to the Third Hall of the Royal Civil Court of Malta and its dependencies, setting forth his desire of recognising the respondent, so that he might enjoy all the rights and privileges attributed by the law to legitimate and natural children, and craving the permission of the Court "to enter into an act of legitimation in favour of the said Eduardo, his natural son, for all the effects of law, and in the best manner which the law allows." The Court, after obtaining the necessary information, granted the required permission, and appointed the act of legitimation to be

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made with the intervention of the judge. Accordingly, on the 31st of August, 1839, Paolo Antonio Ciantar appeared before one of Her Majesty's judges, sitting in the Third Hall of the Royal Civil Court, and executed an act of legitimation, by which he declared the respondent to be his legitimate and natural son, and gave and granted him, inter alia, full power and liberty "to succeed him, his father, both by will and ab intestato, to all and whatsoever his property, and equally to all his rights, actions, claims, and pretensions to which he should and can succeed according to law, as if the said Eduardo had from the beginning been born natural and legitimate."

It may be proper to notice here, because they are circumstances relied on by the appellant, that the proceedings in 1839 with a view to the legitimation of the respondent were conducted ex parte, in so far as no one representing the next of kin of the testator Paolo Ciantar was cited as respondent; and also that, neither in the petition to the Third Hall, nor in the written proceedings which followed upon it, was the fact disclosed that, at the time of the respondent's conception and birth his father Paolo Antonio Ciantar was a married man.

Upon the death of his father, in 1877, the respondent assumed, and he still retains, possession of the real estates settled by the will of Paolo Ciantar.

The parties who, in this suit, are represented by the appellant Giovanni Gera, allege themselves to be four of the five nearest next of kin by blood, in equal degrees, to the testator, who were living at the time of his son Paolo Antonio's decease; but the respondent does not admit that their relationship to the testator has been proved. In the libel filed on their behalf in the First Hall of the Civil Court, on the 13th of October, 1877, they claim from the respondent four fifth shares of the real estates, with a corresponding proportion of mesne profits. The judge of the First Hall, on the 2nd of January, 1880, held that they had established their propinquity to the testator; that the legitimation of the respondent in 1839 was, according to Maltese law, invalid; and gave them decree in terms of their libel, restricting their claim for mesne profits to rents accruing after the 5th of April, 1878. Upon appeal to the Second Hall, the learned Judges of

that Court reversed his decree, and gave judgment for the respondent. They were unanimously of opinion that the legitimation of the respondent was valid, and that he was consequently entitled to take, under the will of 1812, as the legitimate and natural child of Paolo Antonio Ciantar. In that view, it became unnecessary to decide whether the appellant's constituents had proved their title as nearest next of kin to the testator.

Legitimation per rescriptum principis was first introduced into the written law of Rome by the Emperor Justinian, who enacted (Nov. 89, cap. 9), that natural children should be legitimated, on the requisition of the father, in certain special circumstances, as in the case when he had no lawful issue, and marriage with their mother had become impossible. The same right was given (Nov. 89, cap. 10), when the father, who, from some fortuitous cause, had been prevented from legitimating his natural offspring during his lifetime, declared in his testament that they should succeed to him as his lawful children and legal heirs. The effect of the new relation constituted between children so legitimated and the father is thus expressed,—"Ut sub potestate ejus consistant, nihil a legitimis filiis differentes." (89 Nov., cap. 9, ad fin.) The privilege conferred by these novellæ was limited to children who were naturales in the sense of Roman law; it being expressly declared (Nov. 89, cap. 15) that children born ex complexibus aut nefariis aut incestis aut damnatis were not to be considered naturales, and were not to participate in the benefit of the new law. Notwithstanding that exception, the Emperor, in the exercise of his plenary power, was in use to legitimate children of the latter class by special rescript. What was given to one species of illegitimates as matter of legal right, was only extended to the other as matter of Imperial grace.

After the dissolution of the Roman Empire, the principle of Justinian's law was generally adopted by Christian States, but in course of time it became subject, in different countries, to various modifications which were suggested either by the altered condition of domestic relations, or by the constitution of the government. Under the new civil law of Europe, concubinage was not recognised as a legal relation, and there was consequently no class of children precisely corresponding to filii naturales, according

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to the strict acceptation of that term in the jurisprudence of Rome. By analogy, the illegitimate offspring of parents who were free to marry at the time of their conception and birth were regarded as naturales. On the other hand, children born of an incestuous connection, or of the adulterous intercourse of two married persons, or of a solutus and a conjugata, were not so regarded, but it was frequently a vexed question to which of these classes children ex conjugatô et solutâ belonged. Legitimacy was conferred upon both classes, with this difference, that, in the case of natural children, legitimation was said to be intra ordinem, or in terms of the municipal law, and was generally attended by the same legal consequences; whereas, in the case of those born ex damnato coitu, legitimation was extra ordinem, and dependent on the will of the autocratic ruler, who could, and not unfrequently did, qualify his act by reservations which protected the interest of heirs lawfully born.

It does not seem to admit of doubt that after the island of Malta was granted by Charles the Fifth to the Knights of St. John, the Grand Master of the Order became Imperator, in the fullest sense of the word. During the eighteenth century there are instances of his exercising the power of legitimation, and in 1784 the Code Rohan, which still forms the basis of the municipal law of Malta, was enacted by the Grand Master whose name it bears, with the advice of his council. When Malta, in 1800, became a British possession, Her Majesty's Governor administered the law of legitimation, of which the case of Paolo Antonio Ciantar, already referred to, is an example. By an ordinance dated the 25th of May, 1814, the governor reconstituted the civil and criminal tribunals of the island, and, inter alia, declared that the Third Hall of the Civil Court should in future "perform all acts of voluntary jurisdiction hitherto performed by the civil judge, or by the government, on a petition from the party and a report from the civil judge." It is in virtue of the jurisdiction so conferred upon them that the judges of the Third Hall now exercise the power of sanctioning acts of legitimation.

It was conceded in argument by the appellant's counsel, and it really does not admit of serious dispute, that in deciding the present case effect must in the first instance be given to the

municipal law, as it is to be found in the Code Rohan and in Maltese precedents. If the municipal law does not furnish sufficient grounds for a satisfactory decision, then, and in that event only, it becomes legitimate to refer to the principles of the common or civil law. The Code Rohan specially enacts (vol. 1, c. 8, § 37) that in cases for which the municipal law has made no provision, or no adequate provision, recourse must be had to the common law.

The argument addressed to us on behalf of the appellant may be summed up in these propositions: that, according to the civil law, and also according to the municipal law of Malta, the respondent was natus ex nefario coitu, so that his legitimation could not be obtained in ordinary course of law, but required a special dispensation from the sovereign authority; that, assuming the legitimation of bastards who were nefarii to have been within the competency of the supreme authority in Malta prior to 1814, no such dispensing power was given to the Third Hall of the Civil Court by the ordinance of that year; that assuming the Court to have had the power of granting legitimation to the respondent, he is nevertheless by law incapable of taking the estates settled by the will of Paolo Ciantar, in prejudice of the substitution to the testator's nearest next of kin; and lastly, that the authority of the Court was surreptitiously obtained by Paolo Antonio Ciantar in 1839, and that the decree and notarial act of legitimation are therefore null. All these points were fully and ably argued by Sir Walter Phillimore and Mr. Digby. Copious reference was made by counsel to treatises on the civil law by Italian, Spanish, French, and Dutch jurists of eminence, and also to the decisions of the Rota Romana. At the conclusion of the argument for the appellant, their Lordships were clearly of opinion that the case depends upon the municipal law of Malta, and that the judgment appealed from is in strict accordance with that law. It is not necessary to rely upon the common law; although in forming an opinion upon the case their Lordships have been much indebted to the learned Judges of the Second Hall for the learning and ability with which they have discussed the numerous civil law authorities which counsel brought under their notice.

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There are in the papers before us two instances of legitimation by the Grand Master, of children whose parents were not free to marry, taken from the Maltese Records, before the promulgation of the Code Rohan. One of these is the case, in 1753, of Marco Antonio Borg, the son of Dr. Martino Formosa born ex damnato coitu, who was declared to have the same rights of succession to his father, as a legitimate and natural son procreated of lawful marriage, exceptis bonis ex fideicommisso provenientibus, ne legitimis et ex legitimo matrimonio procreatis ad illa vocatis præjudicium inferatur. The other is the case, in 1771, of Anna Maria, the illegitimate daughter of Andrea Dibarro, a married man, by a single woman; and to her also were granted all the privileges allowed by law to natural and legitimate children, in so far as concerned her father's estate, exceptis bonis fideicommisso subjectis. The reservation attached to the grant of legitimation in these cases indicates that, but for the exception, the legitimated child would have become naturalis et legitimus for all purposes of succession, and would have taken as its father's legal heir, by substitution as well as ab intestato.

The Code Rohan does not prescribe the mode of procedure with a view to the legitimation of children born illegitimate; that was left to the operation of the law as it then stood. But provision is made by sect. 60 of book 4, c. 1, with regard to the effect of future grants of legitimation by the Grand Master, expressed in general terms, upon the interests of substitutes under fideicommissa or entails. In order to appreciate the meaning of sect. 60, it is necessary to refer to the context of the preceding sects. 57, 58, and 59. These clauses are as follows:—

Sect. 57: "It shall not be permitted to parents to give, leave by will, or in any other manner whatsoever cause to pass out of their substance to legitimated children more than the smallest portion that shall fall to any one of their children, grandchildren, and great grandchildren, legitimate and natural born of lawful marriage."

Sect. 58: "Then to children who are natural, spurious, or in any other way whatever illegitimate, if there are legitimate and natural children, alimony must be left by will, and in default of legitimate and natural children, or of their descendants, also

legitimate and natural, it shall be lawful to devise to them one half of the estate, and the other half shall go to such ascendants or other relations as are poor and next of kin, the rule of succession ab intestato being observed, if there be such relations, and failing them, it shall be lawful to leave by will to the said illegitimate children the entire estate to the exclusion of others."

Sect. 59: "Parents will also be bound to leave by will to incestuous, adulterous, and similar children what is necessary for their aliment."

Sect. 60: "Any legitimation whatever of the children mentioned in the foregoing sects. 57 and 58 that shall be granted by us shall always be, and be understood to be, granted without any prejudice to legitimate and natural children, in respect also of such property as is subject to entail founded by an ascendant or a collateral."

It appears to their Lordships to be clear, in the first place, that, as pointed out by the learned judges in the Court below, legitimated children are, in sects. 57 and 58, dealt with as "legitimi et naturales." Otherwise there would have been no occasion for introducing, in sect. 57, the words "born of lawful marriage" in order to distinguish children legitimate by birth from children having the status of legitimacy by force of rescript. Then to hold that, in sect. 58, children legitimati are not included in the expression "legitimate and natural" would, in the case of parents who had legitimated children and no lawfully born offspring, give one half of their estate to needy next of kin by force of law, and enable the parents to devise the remaining half to their bastard issue, to the entire exclusion of the legitimati. It was unnecessary to repeat the qualifying expression "born of lawful marriage" in sect. 60, where the context plainly shews that legitimated children are contrasted with those who are legitimate by birth.

In the second place, it is, in the opinion of their Lordships, equally clear that the provisions of sect. 60 apply to bastards of every denomination, who may be admitted by rescript to the status of legitimacy. In that section, the recipients of the benefit of legitimation are described as "the children mentioned in the "foregoing sects. 57 and 58." Sect. 57 simply mentions

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"legitimated children," or, in other words, all legitimated children. Sect. 58 makes mention, not only of children who are natural or spurious (a definition which would not have exhausted the category of bastards), but of those who are "in any other way whatever illegitimate." Now "illegitimate" is not a term confined to any particular class of bastards, it includes every child born out of lawful wedlock, irrespective of the character of the connection to which it owes its birth.

In the third place, their Lordships are satisfied that the provisions of sect. 60, with respect to property entailed by an ascendant or collateral, were merely intended to protect the interests of the lawfully procreated descendants of the same parent in a question with his legitimated children, and that they were not intended to prevent the legitimated children from taking under an entail, as his heirs legitimi et naturales, in priority to his collateral heirs. The limitations of a fidei-commissum may nevertheless be so expressed as to exclude from succession children not born in lawful wedlock, and in that case collateral heirs must be preferred to descendants legitimati, not under the provisions of sect. 60, but by force of the limitation. In cases where the terms of the entail do not exclude them, the Code Rohan by plain implication recognises the legal right of legitimati to take as substitutes, failing lawfully begotten issue of their parent. Sect. 60 is not intelligible except upon the assumption that by the law of Malta the legitimatus had that right, and that, in order to give a preference, in entailed succession, to the issue of his parents' lawful marriage, express legislation was necessary. The enactments of sect. 60 annex to every subsequent act of legitimation an implied restriction of the legitimated child's rights of succession, which, prior to 1784, would, if the Grand Master had thought proper to enforce it, have been inserted in his fiat authorizing the Act. Indeed, the enactments go farther than that, because they convey to the lieges of Malta the intimation that in future the Grand Master will grant legitimation in terms of the Code, and upon no other condition.

In these circumstances, it is not remarkable that not a single instance has been produced of legitimation per rescriptum principis after the enactment of the Code Rohan, in which a salvo

jure clause has been inserted, as in the previous cases of Marco Antonio Formosa and Anna Maria Dibarro. In cases occurring under the Code, legitimation seems to have been invariably granted in terms of law; and the decree of the Court legitimating the respondent forms no objection to that rule. He is simply declared to be legitimate "for all the effects of law, and in the best possible way known to the law."

That it was the practice of the British Governor of Malta, and afterwards of the Third Hall of the Civil Court, to confer the status and privileges of legitimacy (so far as allowed by the code), upon children born, like the appellant, ex uxorato et solutâ, is attested by the cases which have been put in evidence. In point of fact, the Governor and the Court, have, in such cases, successively exercised the same power of conferring legitimacy which admittedly belonged to the Grand Master. The respondent and his father Paolo Antonio were illegitimates of the same class. Whatever may have been the case in regard to the respondent, it is obvious that the whole circumstances of his father's birth were known to the civil judge, to whom the petition of Paolo Ciantar was referred for inquiry. The learned judge reported in favour of the application, upon the special ground that "such a benefit is not in these days customarily denied either to spurious, adulterous, or even to incestuous children;" and acting upon that advice the governor granted the prayer of the petition. It also appears that His Excellency had previously, in December, 1809, granted legitimation to the child of Vincenzo Mattei, a married man, the mother being unmarried.

After the transfer of jurisdiction, it is proved that the Court in the exercise of its new functions legitimated, "in the terms prescribed by the municipal law," two more of Vincenzo Mattei's children, bastards of the same class, and by the same mother, the one in February, 1815, and the other in June, 1820. On the 23rd of June, 1824, the Court granted the like privilege, in terms of law, to Marianna Naudi, the daughter of an unmarried man and a married woman, and therefore an adulterous child, there being, in the case of such illicit connection, what the civilians term invasio tori. In April, 1837, upon the petition of Mariantonia, the wife of Vincenzo Mattei, no less than three of her

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adulterous issue were legitimated in terms of the municipal laws; and, in the same year, a similar favour was extended to the bastard children of married women in the three other cases of Luigi Tedesco, Salvatore Ellul, and Filippo Manicolo.

These cases are conclusive in regard to the practice followed by the Court between 1814 and 1839; but it is a necessary consequence of the appellant's argument that, in every one of them, the Court exceeded its jurisdiction, and usurped the sovereign authority of the State. Their Lordships are unable to come to that conclusion. If the granting of legitimation to children in the position of the respondent had been a matter wholly dependent upon the arbitrary exercise of imperial power, it might have been plausibly contended that the right was a prerogative of, and could not be severed from the supreme authority. But that was not the case in Malta. An application for the legitimation of a child, whether born ex conjugato et solutâ or of two persons free to marry, was a quasi judicial proceeding, and was disposed of by the head of the state, upon well recognised considerations, and with the assistance and advice of a judge of the Civil Court. Power or jurisdiction of that kind may, with perfect propriety, and without any violation of constitutional principles, be delegated to a Court of Justice. Their Lordships do not doubt that the exercise of such jurisdiction was within the competency of the Governor of Malta, or that he had the power to transfer it to the Civil Court. In their opinion, the terms of the Ordinance of 1814 are so framed as to give jurisdiction to the Court in the case of every petition for legitimate rights, which, according to previous practice, would have been referred to a judge, for inquiry and report, by the Grand Master, or the Governor. The practice of remitting to a judge in such cases as that of Anna Maria Dibarro in 1771, or that of Paolo Antonio Ciantar in 1810, being sufficiently established, it necessarily follows that in 1839 the Court had jurisdiction to grant legitimation to the respondent.

Assuming, in the meantime, that there was no flaw in the proceedings, the effect of the decree and consequent notarial Act of 1839, was to give to the respondent the character and rights of a child legitimus et naturalis, so far as permitted by the municipal

law. Upon the decease of his father, without issue lawfully born, who would have succeeded in priority to him according to the Code Rohan, the respondent became entitled to take under the fideicommissum created by the will of Paolo Ciantar, unless it were shewn to have been the intention of the testator to exclude legitimated children from his succession. The will contains no expression which could with the least plausibility be construed as indicating an intention of that kind. On the contrary, the testator, in gremio of the instrument, specially refers to the notarial act by which he carried out the fiat of the governor legitimating Paolo Antonio, his universal heir; and, in that act, he expressly declares Paolo Antonio to be his legitimate and natural son. The respondent, at the time of his father's death, was, so far as concerned legitimacy, in pari casu with Paolo Antonio at the time the will was made; and, were it necessary to decide the point for the purposes of this case, it would be difficult to hold that the testator, whilst he by reference fully recognised his own legitimated son as filius legitimŭs et naturalis, intended to deny to a grandson similarly legitimated the character of a legitimate and natural child.

The appellant's argument, founded upon alleged irregularities in the proceedings of 1839, requires a brief notice. It is said that the nearest next of kin of Paolo Ciantar ought to have been cited, and that the fact of Paolo Antonio being a married man ought to have been disclosed; that the Court, if the next of kin had appeared for their interest, and explained the circumstances of the respondent's birth, would, in all probability, have inserted a condition in the decree, in order to prevent their right of succession under the will from being prejudiced by his legitimation. That opportunity not having been conceded to them, it was argued that the respondent's legitimation must be treated as surreptitious and void in law. But a petition for the legitimation of a child is not a proceeding in foro contradictoria. It is an appeal to the voluntary jurisdiction of the princeps or of the Court, whose exercise of that jurisdiction is governed by considerations derived from the state of the parents' family and the interests of the child sought to be legitimated. No case has been referred to, since the date of the Code Rohan, in which

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persons whose interests might be affected by the legitimation were cited as parties or have appeared for their interest. The suggestion that the Court might have attached a condition for the protection of the next of kin does not commend itself to their Lordships. In their opinion, the Court had no power to impose conditions of that kind. The Ordinance of 1814 gave the Court power to grant legitimation (as it has been in use to do) in terms of law, or, in other words, to grant the status of legitimacy, leaving it to the municipal law to determine what its effects are to be.

Then, as to the alleged non-disclosure of Paolo Antonio's marriage. The fact does not appear in the petition or the decree of Court, which, together with the notarial act, form the written record of the proceedings. The decree bears that the Court, before granting the prayer of the petition, had "obtained the necessary information," but what that information was nowhere appears. Presumably, such information comprehended full details as to the position of the father, and the condition of the family of which Paolo Antonio, then an infant six years of age, was about to be made a legitimated member. It is impossible to affirm that the Court was in ignorance of the fact, or even that it was probably ignorant. In these circumstances their Lordships are of opinion that the presumption omnia rite et solenniter acta applies. It would be contrary to all principle to set aside a decree affecting status, after the lapse of thirty-eight years, upon such slender and conjectural grounds. Besides, their Lordships are by no means satisfied that, if it were substantively proved that the Judge who gave the decree had no knowledge of Paolo Antonio's marriage, the decree ought therefore to be set aside. Having regard to the precedents already referred to, it does not appear to their Lordships that his knowledge of the fact would have raised any impediment to the granting of the decree.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed, with costs to be paid by the appellant.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondent: *Ward, Mills, Witham, & Lambert.*

[PRIVY COUNCIL.]

BANK OF TORONTO . . . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

MERCHANTS' BANK OF CANADA . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

CANADIAN BANK OF COMMERCE . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

NORTH BRITISH MERCANTILE INSURANCE COMPANY, AND OTHERS . . } DEFENDANTS;

AND

LAMBE . . . . . PLAINTIFF.

J. C.*

1887

June 10, 11, 22, 29; *July* 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Canada—Distribution of Legislative Powers—British North America Act, 1867, *s.* 91, *cl.* 2, 3, 15, *s.* 92, *cl.* 2—*Direct Taxation.*

Held, that Quebec Act 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires of the provincial legislature.

A tax imposed upon banks which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of sect. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15, of sect. 91.

Similarly, with regard to insurance companies taxed in a sum specified by the Act.

THE first three appeals were from three decrees of the Court of Queen's Bench (Jan. 23, 1885) reversing decrees of the Superior

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

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Court for Lower Canada in the district of Montreal (May 12, 1883); the fourth appeal was from a decree of the Court of Queen's Bench (Jan. 23, 1885) affirming a decree of the Superior Court (May 23, 1884).

The several actions were brought by the respondent in his capacity of license inspector for the revenue district of Montreal against the several appellants to recover the amount of certain taxes imposed on the appellants by Quebec Act, 45 Vict. c. 22. With the fourth action thirty-seven other actions by the same plaintiff against thirty-seven other insurance companies had been consolidated. The question in all the cases was whether the Act in question was valid, which depended upon whether it was within the powers conferred upon the provincial legislatures by the British North America Act of 1867. The four appeals were not heard together; but as the question in issue was the same their Lordships intimated at the close of the appellant's arguments in the first case that they would either deliver judgment therein before hearing the later appeals or reserve judgment until they had heard two counsel in respect of all three appeals.

The facts are stated in the judgment of their Lordships.

W. H. Kerr, Q.C. (Canada), and *Kenelm Digby*, for the appellant in the first appeal.

Cohen, Q.C., and *W. W. Kerr*, for the appellant in the second appeal.

Blake, Q.C. (Canada), and *Jeune*, in the third appeal.

W. H. Kerr, Q.C. (Canada), and *W. W. Kerr*, in the fourth appeal.

Geoffrion, Q.C. (Canada), and *Fullarton*, for the respondent in all the appeals.

Kerr, Q.C., and *Digby*, in the first appeal contended that the judgment of the Supreme Court was wrong, and that 45 Vict. c. 22, was void.

The question of its validity turns on (1) the construction of

sect. 92 of the British North America Act, 1867, (2) on the further question whether even if the statute is primâ facie within the powers conferred by sect. 92 its subject-matter does not belong to the matters exclusively reserved to the Dominion parliament by sect. 91. In the latter case the provisions of sect. 92, if construed unfavourably to the appellant, are overborne by those of sect. 91, and the statute is invalid. Reference was made to *Attorney-General for Quebec* v. *Queen Insurance Company* (1); *Citizens Insurance Company* v. *Parsons* (2); *Dobie* v. *Temporalities Board* (3); *Russell* v. *The Queen* (4); *Hodge* v. *The Queen* (5); *Cushing* v. *Dupuy* (6). The statute is not within the powers conferred by sect. 92, § 2, for the following reasons:—

First, the taxation sought to be imposed by the statute is not within the province. The bank was incorporated by the Act of the parliament of Canada prior to the British North America Act, namely, by 18 Vict. c. 205, whereby it was provided that the head office of the bank should be at Toronto in the province of Ontario: see subsequent statutes affecting the bank, 20 Vict. c. 160, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict. c. 5. It is admitted that far the greater portion of the capital belongs to persons not residing in the province of Quebec. The provincial legislature can only have jurisdiction to impose taxes on property situated within the province, or on persons residing within the province. No other sense can be given to the words "within the province." The cases decided on the Income Tax Acts shew that the corporation in the present case cannot be considered as "within the province:" *Sulley* v. *Attorney-General* (7); *Attorney-General* v. *Alexander* (8): *Cesena Sulphur Co.* v. *Nicholson* (9); *Gilbertson* v. *Fergusson* (10).

Second, the tax is not a "direct tax" within the meaning of sect. 92, § 2. The question is, what did the legislature in 1867 mean by a direct tax. The tax imposed must be shewn to be a direct tax, and not either an indirect tax, or a tax falling under

(1) 3 App. Cas. 1090.
(2) 7 App. Cas. 96.
(3) 7 App. Cas. 136.
(4) 7 App. Cas. 829.
(5) 9 App. Cas. 177.
(6) 5 App. Cas. 409.
(7) 5 H. & N. 711; S. C. 29 L. J. (Ex.) 464.
(8) Law Rep. 10 Ex. 20.
(9) 1 Ex. D. 428.
(10) 5 Ex. D. 57; S. C. 7 Q. B. D. 562.

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neither class: see Mill's Political Economy, book v., ch. 5. The tax is a tax on the right or privilege of carrying on the business of banking in the province and being a tax on a particular business as such must ultimately be paid by the customers of the bank: see Mill's Political Economy, book v., ch. 3; Smith's Wealth of Nations, book v., ch. 2; Fawcett's Manual of Political Economy, book iv., ch. 3; Littrè, Dict. s. v. Contributions. This is the test adopted in *Attorney-General for Quebec* v. *Queen Insurance Company* (1); *Attorney-General for Quebec* v. *Reed* (2). One of the principal characteristics of a direct tax is its generality—falling on all persons alike. It is in this sense that the term is used in the American constitution: see *Hylton* v. *United States* (3); *Veazie Bank* v. *Fenno* (4). Further, the provisions of the British North America Act shew that it was not intended to include a tax of this kind in the class of direct taxes. It is in the nature of a license tax, as mentioned in sect. 92, § 9, taxes of that kind not being classed by the legislature as direct taxes: see, too, *Severn* v. *The Queen* (5), where the judges held unanimously that a license tax was not a direct tax. The examination of the provisions of the British North America Act and of other English statutes contained in the judgment of Dorion, C.J., in the Court below, shews that the tax would, according to the views of the English legislature, be regarded as a license or excise tax, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term "direct taxes" in sect. 92, § 2.

Lastly, the subject-matter of the statute falls clearly within sect. 91, and therefore even if within the words of sect. 92 the powers of the Dominion are to prevail over the powers of the Province.

By sect. 91, § 2, the regulation of trade and commerce; § 3, the raising of money by any mode or system of taxation; § 14, the currency and coinage; § 15, banking and incorporation of banks; § 19, interest; § 20, legal tender, are reserved for the exclusive jurisdiction of the Dominion legislature. The Dominion has

(1) 3 App. Cas. 1090.
(2) 10 App. Cas. 141.
(3) 3 Dallas, 171.
(4) 8 Wallace, 534.
(5) 2 Supreme Court of Canada Rep. p. 70.

exercised these powers by incorporating and regulating banks, providing for the amount of the debts which they may incur, the amount of reserve which they must hold in Dominion notes, and for the circulation of Dominion notes: see Statutes of Canada, 18 Vict. c. 205; 34 Vict. c. 5, §§ 14, 15, 16; 49 Vict. c. 6. It is submitted that it is impossible for the Dominion legislature to exercise these powers if banks as such are subject to taxation by the provincial legislatures. "The power to tax involves the power to destroy:" see *McCulloch* v. *Maryland* (1); *Osborn* v. *United States Bank* (2); *Railroad Co.* v. *Peniston* (3); Kent's Commentaries (by Holmes), vol. i. p. 426.

Cohen, Q.C., and *Blake*, Q.C., were subsequently heard for the appellants in the other cases in compliance with the above intimation from their Lordships.

The counsel for the respondent were not called upon.

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July 9.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the parliament of the Dominion and the legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated companies are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first.

In the year 1882 the Quebec legislature passed a statute

(1) 4 Wheaton, 436. (2) 9 Wheaton, 738.
(3) 18 Wallace, 5.

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entitled "An Act to impose certain direct taxes on certain commercial corporations." It is thereby enacted that every bank carrying on the business of banking in this province; every insurance company accepting risks and transacting the business of insurance in this province; every incorporated company carrying on any labour, trade, or business in this province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid up-capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an Act of the then parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The bank resists payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposes it. Mr. Justice Rainville sitting in the Superior Court took that view, and dismissed an action brought by the government officer, who is the respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgment were as follows:—That the tax is an indirect one; that it is not imposed within the limits of the province; that the parliament has exclusive power to regulate banks; that the provincial legislature can tax only that which exists by their authority or is introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is

also a matter of a merely local or private nature in the province, and so falls within class 16 of the matters of provincial legislation. It has not been contended at the bar that the provincial legislature can tax only that which exists on their authority or permission. And when the appellants' counsel were proceeding to argue that the tax did not fall within class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of sect. 92 of the Federation Act, viz., "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in sect. 91 or in the other parts of the Act so to cut down the full meaning of the words of sect. 92 that they shall not cover this tax?

First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the

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first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:—

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellant's counsel, nor only because

it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of sect. 92 of the Federation Act.

There is nothing in the previous decisions on the question of

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direct taxation which is adverse to this view. In the case of *Queen Insurance Co.* (1) the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of sect. 92, which relates to licenses. In *Reed's Case* (2) the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's Case* (3) the tax in question was one for licences which by a law of the legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be ultra vires, mainly on the grounds that such licences did not fall within class 9 of sect. 92, and that they were in conflict with the powers of parliament under class 2 of sect. 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a licence duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of sect. 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, nor to leave the

(1) 3 App. Cas. 1090. (2) 10 App. Cas. 141.
(3) 2 Sup. Court of Canada, 70.

amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province it is for the Legislature and not for Courts of Law to judge of its expediency.

Then is there anything in sect. 91 which operates to restrict the meaning above ascribed to sect. 92? Class 3, certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons* (1). Their Lordships there said (2): "So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the parliament in relation to matters falling within class 2, viz. the regulation of trade and commerce; and within class 15, viz., banking, and the incorporation of banks. Their Lordships think that this contention

(1) 7 App. Cas. 96. (2) 7 App. Cas. 108.

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gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in *Severn's Case* (1) it was the view of the Supreme Court that they operated to invalidate the licence duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parson's Case* (2), and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or interprovincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case* (2), they would be straining them to their widest conceivable extent.

Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

(1) 2 Sup. Court of Canada, 70.

(2) 7 App. Cas. 96.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament.

It only remains to refer to some of the grounds taken by the learned judges of the Lower Courts, which have been strongly objected to at the Bar. Great importance has been attached to French authorities who lay down that the impôt des patentes, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the provincial legislatures possess powers of legisla-

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tion either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondents' counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other banks. The insurance company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The appellants in each case must pay the costs of the appeal.

Solicitors for the Bank of Toronto: *Ingle, Cooper, & Holmes.*

Solicitors for the Merchants' Bank of Canada: *Hewlett & Preston.*

Solicitors for the Canadian Bank of Commerce: *Champion, Robinson, & Poole.*

Solicitors for the Insurance Company: *Hollams, Son, & Coward.*

Solicitors for the respondent: *Simpson, Hammond, & Co.*

[PRIVY COUNCIL.]

NORTH-WEST TRANSPORTATION COMPANY, LIMITED, AND JAMES HUGHES BEATTY . . . . . } DEFENDANTS;

AND

HENRY BEATTY, ON BEHALF OF HIMSELF AND OTHERS . . . . . } PLAINTIFF.

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June 23, 24, 28, 30; *July* 21.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Sale by Director to Company—Ratification at General Meeting—Vendor's Right to vote as Shareholder.

Where a voidable contract, fair in its terms and within the powers of the company, had been entered into by its directors with one of their number as sole vendor:—

Held, that such vendor was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company.

APPEAL from a decree of the Supreme Court (April 9, 1886) reversing a decree of the Court of Appeal, Ontario (April 17, 1885), and affirming a decree of the Ontario Chancery Division (May 6, 1884) which set aside the sale in question by the appellant James Hugh Beatty, to the company. The judgment of the Chancellor at Toronto is reported in 6 Ontario Rep., 300. The main question in the case was whether a shareholder in a company is entitled to vote at a meeting of the company on a question in which he is personally interested.

The facts of the case are stated in the judgment of their Lordships.

The judgment of the First Court (19 Jan. 1884) was to this effect:—

"All suspicions of fraud or unfair dealings may be discarded

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

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and the question resolves itself into one of purely equitable law, that is, whether the purchase from the director having been submitted to the body of the shareholders and adopted by a majority of votes it is open for the dissentient plaintiff to undo the sale by the intervention of the Court. One important element to be considered is that the majority was secured by reason of the votes upon the shares held by the vendor without which the result would have been adverse to the purchase."

After examining the English authorities the Chancellor concluded: "My judgment proceeds upon the ground that the vendor's fiduciary position incapacitates him from coercing the minority by means of a majority secured by his own vote in his own favour, without regard to the fairness or unfairness of the transaction. There has been no valid ratification by the company."

The Court of Appeal (Hagarty, C.J., Burton and Osler, JJ.), unanimously reversed this decree. They agreed with the Court below in holding that the case was "free from imputation of fraud or collusion." But they held in effect that there was no principle of equity to prevent the defendant, James Hughes Beatty, exercising his rights as a shareholder and voting as a shareholder in favour of the purchase, although he had a personal interest in such purchase.

The Supreme Court of Canada (Ritchie, C.J., Fournier, Henry, Taschereau and Gwynne, JJ.), unanimously reversed this decree and restored that of the First Court.

The Chief Justice held that the defendant J. H. Beatty by reason of his position as director of the company could not vote at the shareholders' meeting for the confirmation of the bye-law authorizing a sale from himself to the company. Fournier, J., agreed with the Chancellor. Henry and Taschereau, JJ., held that the bye-law was improperly passed at the directors' meeting, because the appellant J. H. Beatty voted for it, and that for this reason the bye-law was illegal and incapable of confirmation. Gwynne, J., held that "the defendant James Hughes Beatty upon the vote for the adoption of the bye-law gave 291 votes, which, together with 15 other votes given by three of the other directors, constituted the whole number, namely, 306 votes given

in favour of the bye-law, and the purchase of the steamer. The votes given against the bye-law and the purchase were 289 in number. The bye-law was thus carried and the purchase made by the votes of the defendant James Hughes Beatty, himself alone, acting in the double and conflicting characters of vendor and vendee. The defendant could no more in this manner act in such double and conflicting characters than he could as director. He can no more by his possession of 291 shares out of 600 compel the holders of the other 289 shares to purchase his property against their will at his price, at a meeting of shareholders, than he could do so by his casting voice at the board of directors."

Sir *R. E. Webster*, A.G., and *Jeune*, for the appellants, contended that the judgment of the Court of Appeal was correct, and that of the Supreme Court should be reversed. The fiduciary position of J. H. Beatty as director had, it was submitted, nothing to do with the question. His vote as shareholder at the general meeting was the thing in dispute, whether he was prevented from giving it on a matter in which he was personally interested. As for his voting for the bye-law at the directors' meeting it had no other object or effect than that of bringing the matter before a general meeting. At the most it was voidable and not void, and the question was as to the validity of its ratification, and that depended upon the validity of the appellant's vote as a shareholder. There is no principle of equity why a shareholder should be disqualified from voting at a general meeting, or why his vote should be examined and disallowed, except for fraud. The disqualification of directors results from their agency. The shareholders are principals. In this case if the majority were interested in the vessel sold, the minority were interested in a competing line and had interests adverse to the company; and the validity of their votes might also on the respondent's contention be examined on the ground of personal interest. The motives of shareholders for their votes cannot be inquired into. If there is no fraud they are free to exercise their own judgment as they please, and that exercise cannot be called in question by other shareholders. Reference was made

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to *Pender* v. *Lushington* (1); *M'Dougall* v. *Gardiner* (2); *East Pant Du United Lead Mining Company* v. *Merryweather* (3); *Mason* v. *Harris* (4).

Sir *Horace Davey*, Q.C., and *Bremner*, for the respondent, contended that the decree of the Supreme Court was right. They denied that there was any contract at all: *Aberdeen Railway Company* v. *Blakie* (5); *Ex parte Lacey* (6). As to ratification, it is not a question of ratification by a majority, but by the appellant individually. *Pender* v. *Lushington* (1) only decides that a shareholder has a right to vote and that his motives cannot be examined. Here it is not a question of the shareholder's motives, but of the character and effect of the resolution passed: *Menier* v. *Hooper's Telegraph Works* (7); *East Pant Du Mining Company* v. *Merryweather* (8). The cases shew that you cannot question the shareholder's right to vote, but none of them shew that an interested vote can bind the minority. In *Menier's Case* (7) the majority suffered a particular damage different from that of the minority, and it was held that the latter were not bound by the resolution carried by the former. See also Lindley on Partnership, pp. 598–609; *Const* v. *Harris* (9). In this case, too, the shareholder whose votes are impeached was a director, and it was his own sale of his own property which was the subject of a resolution which was carried by his own vote. The sale was made by himself as director, and confirmed by himself as shareholder, and it was contrary to equity that it should be upheld: *Benson* v. *Heathorn* (10). The shareholders had a right to the protection and help of the directors, and to their unbiased judgment on the contract; deprived of that right, the majority could not bind the minority in confirming such contract. The company have passed a resolution giving the majority a portion of the property of the company. The minority is placed in a most unfair position owing to a technical breach of trust, and its interests are sacrificed in a way which the Court will not sanction even if the case

(1) 6 Ch. D. 73.
(2) 1 Ch. D. 13.
(3) 2 H. & M. 254.
(4) 11 Ch. D. 107.
(5) 1 Macq. 461.
(6) 6 Ves. 625.
(7) Law Rep. 9 Ch. 350.
(8) 2 H. & M. 254.
(9) T. & R. 496, 518.
(10) 1 Y. & C. Ch. 326.

falls short of actual fraud: *McDougall* v. *Gardiner* (1); *Mason* v. *Harris* (2); *Atwool* v. *Merryweather* (3).

Jeune replied.

July 21. The judgment of their Lordships was delivered by

SIR RICHARD BAGGALLAY:—

The action, in which this appeal has been brought, was commenced on the 31st of May, 1883, in the Chancery Division of the High Court of Justice of Ontario. The plaintiff, Henry Beatty, is a shareholder in the North-West Transportation Company, Limited, and he sues on behalf of himself and all other shareholders in the company, except those who are defendants. The defendants are the company and five shareholders, who, at the commencement of the action, were the directors of the company. The claim in the action is to set aside a sale made to the company by James Hughes Beatty, one of the directors, of a steamer called the *United Empire*, of which previously to such sale he was sole owner.

The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may,

(1) 1 Ch. D. 13. (2) 11 Ch. D. 107.

(3) Law Rep. 5 Eq. 464, n.

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however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

The material facts of the case are not now in dispute.

The company was incorporated under the provisions of the Canada Joint Stock Companies Letters Patent Act of 1869. By its charter, dated the 5th of March, 1877, it was authorized to carry on business in the province of Ontario, and to construct, acquire, and maintain steam, sailing, and other vessels for the conveyance of passengers and goods over the navigable waters within or bordering upon the Dominion of Canada, to and from any foreign ports, with power, amongst other things, to sell, charter or dispose of any of such vessels, and to make contracts with any person or corporation whatever.

By sects. 16, 18, and 22 of the Act of 1869, it was provided that the affairs of every company incorporated under its provisions should be managed by a board of directors, the major part of whom should at all times be resident in Canada, and subjects of Her Majesty, and that the directors should have power to make for the company any description of contract into which the company might by law enter, and from time to time to make bye-laws not contrary to law, but every bye-law so made, unless in the meantime confirmed at a general meeting duly called for that purpose, should only have force until the next annual meeting of the company, and, in default of confirmation thereat, should, at and from that time only, cease to have force; and the powers conferred upon the directors by sect. 22 were made subject to a proviso that one fourth part in value of the shareholders of the company should at all times have the right to call a special meeting for the transaction of any business specified in such written requisition and notice as they might issue to that effect.

By bye-laws, made in March, 1877, and duly confirmed, it was provided that the affairs of the company should be managed by a board of five directors; that the qualification for a director should be the holding of five shares in the company; that every shareholder should have as many votes as he had shares in the company; that the annual meetings should be held on the first

Wednesday in February in each year; and that at such meetings the directors should be annually elected, retiring directors being eligible for re-election.

The company commenced business shortly after its incorporation, and acquired for its purposes a fleet of several steamers. In the autumn of 1882, one of its steamers, the *Asia*, was lost, and another, the *Sovereign*, was deemed unsuitable for the company's business. At this time the steamer *United Empire* was in process of building for the defendant James Hughes Beatty, and was approaching completion; the contract for her construction had been entered into in December, 1880, and she was in fact completed on the 20th of May, 1883, a few days before the commencement of the action. The acquisition of the *United Empire* by the company had been suggested to the directors and had been the subject of consideration by them and others interested in the company as early as the close of the year 1881; the loss of the *Asia* led to the matter being further considered, and the sale to the company was brought about in the following manner.

The annual meeting for the year 1883 was held on the 7th of February, and, at such meeting, the defendants were elected directors for the ensuing year; at the same meeting, a discussion took place as to the suggested purchase of the *United Empire*, and it was resolved that a special meeting of the shareholders should be held on the 16th for the purpose of having submitted to them a bye-law for the purchase of the steamer *United Empire*, and also to consider the advisability of selling the steamer *Sovereign*.

At a meeting of the directors held on the 10th of February, 1883, and at which all the directors except the defendant William Beatty were present, it was resolved that a bye-law, which was read to the meeting, for the purchase of the *United Empire* should pass. It is unnecessary to refer in detail to the terms in which this bye-law was expressed; it is sufficient to state that, after reciting an agreement between the company and the defendant James Hughes Beatty, that the company should buy and the defendant should sell the steamer *United Empire* for the sum of $125,000, to be in part paid in cash and in part secured, as therein mentioned, it was enacted that the company should

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purchase the steamer from the defendant upon those terms, with various directions for giving effect to the terms of the contract.

The agreement recited in the bye-law was executed at the same meeting.

At a meeting of shareholders, held, as arranged, on the 16th of February, 1883, the bye-law which had been enacted by the directors was read by the secretary, and, after being modified in its terms, with respect to the price, was adopted by a majority of votes.

The *United Empire*, on her completion, was delivered to the company, and has ever since been employed in the ordinary business of the company.

It is proved by uncontradicted evidence, and is indeed now substantially admitted, that at the date of the purchase the acquisition of another steamer to supply the place of the *Asia* was essential to the efficient conduct of the company's business; that the *United Empire* was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business; and that the price agreed to be paid for the steamer was not excessive or unreasonable.

Had there been no material facts in the case other than those above stated, there would have been, in the opinion of their Lordships, no reason for setting aside the sale of the steamer; it would have been immaterial to consider whether the contract for the purchase of the *United Empire* should be regarded as one entered into by the directors and confirmed by the shareholders, or as one entirely emanating from the shareholders; in either view of the case, the transaction was one which, if carried out in a regular way, was within the powers of the company; in the former view, any defect arising from the fiduciary relationship of the defendant James Hughes Beatty to the company would be remedied by the resolution of the shareholders, on the 16th of February, and, in the latter, the fact of the defendant being a director would not deprive him of his right to vote, as a shareholder, in support of any resolution which he might deem favourable to his own interests.

There is, however, a further element for consideration, arising out of the following facts, which have been relied upon in the

arguments on behalf of the plaintiff, as evidencing that the resolution of the 16th of February was brought about by unfair and improper means.

It appears that, at the commencement of the year 1883, 595 of the 600 shares into which the capital of the company was divided were held by seven living shareholders, and five belonged to the estate of a deceased shareholder; that of the seven living shareholders,—

The defendant J. H. Beatty held	200	shares.
The plaintiff . . .	120	„
S. Neelon (then a director) .	101	„
F. S. Hankey . . .	71	„
The defendant J. D. Beatty .	59	„
J. C. Graham . . .	39	„
The defendant W. Beatty .	5	„

It further appears that the defendant J. H. Beatty purchased the 101 shares of S. Neelon, and that they were transferred to him on the last day of January, 1883, the number of shares held by the defendant being thus raised to 301, an actual majority of all the shares in the company; that on the morning of the 7th of February, before the annual meeting of that day, the defendant J. H. Beatty transferred five of his shares to the defendant Rose, and the like number to the defendant Laird, whereby they respectively became qualified to be elected directors; and that on the same day they were elected directors.

The defendants Rose and Laird deny, and their denial is unimpeached, that there was any agreement or understanding between them or either of them and the defendant J. H. Beatty that they would support his views in respect of the sale of his steamer to the company; they both, however, admit that, previously to the transfers of the shares to them, they considered that the purchase of the steamer would be beneficial to the company, that they accepted the transfer with the view of becoming directors, and that the defendant was well aware of the opinions and views entertained by them. Indeed, the defendant Rose states that he would not have joined the company but for the intention to purchase the steamer.

By the transfers to the defendants Rose and Laird, the number

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of shares held by the defendant J. H. Beatty was reduced to 291, but the united voting power of the three last-named defendants was such that they could command a majority at any meeting of the shareholders.

Though there was a discussion, at the annual meeting on the 7th of February, as to the expediency of purchasing the steamer, the resolution directing a bye-law to be prepared appears to have been passed without any division.

At the meeting of directors of the 10th, the same three defendants were in a position to carry any resolution or to pass any bye-law upon which they were agreed.

At the shareholders' meeting of the 16th the voting was as follows:—

For the confirmation of the bye-law,—

	Votes.
The defendant J. H. Beatty . .	291
The defendant J. E. Rose . . .	5
The defendant R. Laird . . .	5
The defendant William Beatty . .	5
Total . . .	306

Against the confirmation,—

	Votes.
John C. Graham	39
F. L. Hankey	71
The plaintiff	120
The defendant John D. Beatty . .	59
Total . . .	289

It follows that the majority of votes in favour of the confirmation of the bye-law was due to the votes of the defendant J. H. Beatty.

These last-mentioned facts were stated by the plaintiff in his claim in the action, and he not only insisted that the defendant J. H. Beatty was in such a fiduciary relation to the company that it was not competent for him, under any circumstances, to enter into the contract for the sale of his steamer to the company, but he made various charges of fraud and collusion against the

defendant directors, other than the defendant J. D. Beatty, who was also the secretary of the company.

These charges of fraud and collusion were abandoned at the trial of the action, but the facts before referred to were pressed upon the judges, before whom, in succession, the action came, and afforded to those judges who were of opinion that the sale should be set aside the substantial grounds for their decisions.

The action first came on to be heard before the Chancellor of Ontario, who, on the 6th of May, 1884, ordered the sale to be set aside, with the usual consequential directions. All charges of fraud and collusion being discarded, the Chancellor treated the question as one of "purely equitable law," and held that the threefold character of director, shareholder, and vendor, sustained by the defendant J. H. Beatty, involved a conflict between duty and interest, and that, being so circumstanced, he could not be permitted, in the conduct of the company's affairs, to exercise the balance of power which he possessed, to the possible prejudice of the other shareholders.

The defendants appealed against the order of the Chancellor, and, on the 17th of April, 1885, the Court of Appeal of Ontario allowed the appeal, and ordered that the plaintiff's bill should be dismissed, with costs. In the opinion of the members of that Court, the resolution to purchase the steamer was a pure question of internal management, and the shareholders had a perfect right, either to ratify the act of the directors, or to treat the matter as an original offer to themselves, and to assent to and complete the purchase.

From the order of the Court of Appeal the plaintiff appealed to the Supreme Court of Canada, and on the 9th of April, 1886, the Supreme Court reversed the order of the Court of Appeal, and affirmed that of the Chancellor. It appears to have been the opinion of the judges of the Supreme Court that the case turned entirely on the fiduciary character of the defendant J. H. Beatty as a director: that, if the acts or transactions of an interested director were to be confirmed by the shareholders, it should be by an exercise of the impartial, independent, and intelligent judgment of disinterested shareholders and not by the votes of the interested director, who ought never to have

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departed from his duty; that the course pursued by the defendant J. H. Beatty was an oppressive proceeding on his part; and that, consequently, the vote of the shareholders, at the meeting of the 16th of February, 1883, was ineffectual to confirm the bye-law which had been enacted by the directors. The nature of the transaction itself does not appear to have been taken into consideration by the judges in their decision of the case.

From this decision of the Supreme Court of Canada the appeal has been brought with which their Lordships have now to deal. The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be

freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognised the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the *United Empire* was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent must bear the costs of the present appeal.

Solicitors for appellants: *Robinson, Poole, & Robinson.*
Solicitors for respondent: *Ashurst, Morris, Crisp, & Co.*

[PRIVY COUNCIL.]

J. C.* 1887 July 6, 7, 8, 9, 27.

THE CORPORATION OF PARKDALE . DEFENDANTS;

AND

WEST AND OTHERS . . . . . PLAINTIFFS.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Dominion Act 46 *Vict. c.* 24, *s.* 4—*Effect of Order of Railway Committee—Consolidated Railway Act*, 1879—*Right of Railway Company to commence Operations—Conditions precedent.*

Held, that an order of the railway committee under sect. 4 of the Dominion Act 46 Vict. c. 24 does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right.

Held, that such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and surveys" and "Lands and their valuation" which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act.

Where a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order:—

Held, that it was not entitled to commence operations:

Held, further, that under the Act of 1879 the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals.

Jones v. *Stanstead Railway Company* (Law Rep. 4 P. C. 98) distinguished.

APPEAL from two decrees of the Supreme Court of Canada (June 8, 1886) reversing decrees of the Court of Appeal, Ontario (June 23, 1885), and confirming those of a Divisional Court (June 23, 1885).

The facts are stated in the judgment of their Lordships.

The question at issue was whether the appellants were liable to the respective respondents for damage done to the premises of

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

which the respondents are owners by reason of the construction of a railway in Queen Street, a street situated partly in Toronto and partly in Parkdale.

In their statement of claim, as originally delivered, the respondents alleged that the corporations of Parkdale and Toronto were executing the work in question without having passed the bye-laws required by the Ontario Act 46 Vict. c. 45, that as no bye-law had been passed the respondents could not recover compensation under the Municipal Act, and they claimed damages for the wrongful acts of the two corporations, and an injunction to compel them to restore the roads in question to their former condition. The two corporations denied that the alleged wrongful acts were done by them. At the trial the claims of the respondents were amended by setting out that the corporation of Parkdale alleged that the work was done by the railway companies under the Dominion Act 46 Vict. c. 24, but that in fact the subway was being constructed by the corporation of Parkdale and not by the railway companies, and by claiming that if the work was done by the corporation of Parkdale under the Ontario Act (46 Vict. c. 45), a mandamus should issue to them to compel the assessment of compensation under that Act. The plaintiffs further admitted that the corporation of Toronto was to remain joined only for the sake of conformity, and asked no relief against them, and the corporation of Toronto took no part in the proceedings after the hearing in the High Court of Justice, Chancery Division. In their defences, as amended, the corporation of Parkdale relied on the ground that the work was done by the railway companies, through the corporation of Parkdale as their agents, pursuant to the requirements of the railway committee acting under the Dominion Act 46 Vict. c. 24, and denied that they had acted under the Ontario Act 46 Vict. c. 45.

Wilson, C.J., who presided at the trial, gave judgment on the 21st of September, 1884, for the respondents on the ground that the acts complained of were wrongful, not being authorized by the Order in Council. His judgment is reported in 7 Ontario Reports, p. 270. This judgment was upheld by a Divisional Court of two judges on the ground that the corporation could not act as agents for the railway companies, and on the further

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ground that by proceeding under the Ontario Act the corporation of Parkdale could, by taking the necessary steps have legally done the work, and that consequently "the matter could not be treated as one to all intents ultra vires" and that the corporation "were trespassers but within the scope of their authority."

The above judgment of the Divisional Court was reversed by the Court of Appeal by a majority of three judges to one. The majority of judges held that the work was done by the railway companies under the order of the railway committee of the Privy Council, and that the respondents must look to the railway companies for compensation.

The Supreme Court (Ritchie, C.J.; Fournier, Henry and Gwynne, JJ., Taschereau, J., dissenting) reversed this last mentioned judgment. The majority confirmed the judgment of Wilson, C.J., and the Divisional Court, except that Gwynne, J., held that the appellants were in fact acting under the Ontario statute, and were liable thereunder to make compensation.

Sir *R. Webster*, A.G., and *Jeune*, for the appellants, contended that the corporation of Parkdale in executing the work complained of were acting as agents for the railway companies, and that the railway companies had legal statutory authority to construct such works under the powers of the Dominion Act 46 Vict. c. 24, and the order of the railway committee of the Privy Council made thereunder. Consequently the corporation acting as agents were not liable in damages to persons injured by their acts. As the works were actually done by the contractor, Godson, the corporation were not even the actual instruments of the wrong (if any). The proper remedy of the respondents was for compensation to be awarded under the Act, and not in an action for damages for a tort, and still less for an order for restoration of the roads to the status quo ante. It would be illegal and in contempt of the order of the Privy Council for the corporation of Parkdale to replace the roadway in its former condition. It cannot be contended that a party who may be injured by works authorized by the Railway Acts, but who has not sought compensation as provided thereby, has a right to seek such an injunction as is prayed in this case—an injunction

against the execution of an Order in Council made under statutory authority. Reference was made to the Dominion Act, sect. 48, in substitution for sect. 48 of the Consolidated Railway Act, 1879, and to sect. 7, sub-sects. 7 and 8. In this case no land was required to be taken. By a special order under a new Act the corporation did work wholly different from any authorized under the Consolidated Railway Act, that is they worked on land which they did not take and did not alter in the least degree the position or size of the railways. The respondents' remedy therefore was compensation under the Dominion Act; and the payment of that compensation was not a condition precedent to the right to execute the works. See *Hutton* v. *London and South-Western Railway Company* (1). If a legal act is done under statutory powers, the words of the Act must be extended if necessary to give compensation, for otherwise there is no remedy. There is no ruling to the contrary. The respondents' mistake ab initio was in suing and not applying for compensation by way of mandamus if necessary. The contention is that if the railway is authorized to do the work complained of then this action cannot lie against the railway, the corporation, or Godson, who are all covered by authority. If no authority was given then the work was ultra vires the corporation, and then the corporate body is not liable, but the individual corporators who authorized the act. Reference was made to *Mill* v. *Hawker* (2), in which the case put by Kelly, C.B., in his dissentient judgment was widely different from this, and to *Poulton* v. *London and South-Western Railway* (3).

Sir *H. Davey*, Q.C., and *Blake*, Q.C. (Canada), *Gore* with them for the respondents, contended that the judgments of the Supreme Court were right. There were three assumptions at the foundation of the appellants' argument, (1) that there was an Order of the Council advisedly authorizing and requiring this work to be done and in the way in which it was done; (2) that the acts complained of were those of the railway; (3) that the corporation acted as agents for the railway. All three of these assumptions are erroneous. As regards the first, 46 Vict. c. 24, s. 4,

(1) 9 Hare, 259. (2) Law Rep. 9 Ex. 309; 10 Ex. 92.
(3) Law Rep. 2 Q. B. 540.

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was referred to. What happened under that section was that the appellants applied to the corporation of Toronto for their consent to carry Queen Street under the railways by means of a subway. That consent was given and afterwards retracted; pending which proceedings the appellants applied to the railway committee for an order compelling the construction of the subway. The order when granted embodied a provisional agreement made between the appellants and the four railway companies, which agreement would have remained provisional until statutory powers were obtained to carry it out. Nothing was authorized outside the provisional agreement, and the authority given was therefore "without varying and without prejudice to the legal position of any of the parties under the Consolidated Railway Act, 1879, and the amendments thereto." The appellants appointed and paid the engineer who supervised the works, and it was admitted that the railway companies had not made or deposited any map or plan under sect. 8 of the Act of 1879, shewing the land required to be taken, and it was neither proved nor suggested that they had complied as regards the respondents with the requirements of sect. 9, subsect. 12 of the Act. It is said that land was not taken, but the obligation to deposit plans does not depend upon that. The appellants acted in pursuance of the agreement, and did not even purport to act as agents for the railway. It would have been unlawful if they had, for the principals had no authority to delegate their powers, nor the agents authority to accept them: see *Great Northern Railway Company* v. *Eastern Counties Railway Company* (1).

The municipality clearly acted as principals jointly with the companies, and as the chief and moving principals in whose interest and at whose instance the work was done. The agreement with the companies and the contract with Godson were acts of the corporation for which they were liable as principals. No authority or principle can be stated why the corporation is not liable to the respondents; whatever may be the liability of individual corporators to their fellows for allowing or directing the works to be done if ultra vires. It was not suggested in the record that this was an unauthorized act of the corporation. In reality it was

(1) 9 Hare, 306.

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within the corporate powers to do works of this kind, but the particular works complained of were beyond the statutory powers conferred by the Order in Council in pursuance of sect. 4 of the Dominion Act. The result of the cases on ultra vires is that where a servant does an act which is within the scope of the corporate authority if properly done the corporation is liable if the act is improperly done. The irregularity here was the non-compliance with those provisions of the Act of 1879 which constitute conditions precedent to the proper discharge by the corporation of their duties under their contract; not that those duties were beyond the scope of their powers. Damages may be obtained against a corporation for trespass or other tort; whilst if a contract made on its behalf is clearly outside the scope of its authority no action would lie. The full relief that the respondents were entitled to was a mandatory injunction, but this was wisely not pressed for in the Courts below. Reference was made to 36 Vict. c. 48, ss. 407, 424, 425, and to 42 Vict. c. 9 (the Act of 1879), s. 7, sub-s. 6, s. 8, sub-ss. 2, 7, 8, s. 9, sub-ss. 10, 11, s. 15, sub-ss. 1 and 2.

Jeune replied, contending that compliance with the provisions of the Act of 1879 was not a condition precedent, and referred to *Jones* v. *Stanstead Railway Company* (1), which was governed by an analogous Act, 14 & 15 Vict. c. 51.

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July 27.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The facts in these consolidated appeals are few, and not in dispute.

Parkdale is the western suburb of Toronto, and a separate municipality. The boundary between the two municipalities is Dufferin Street, which runs north and south, and intersects at right angles a public highway called Queen Street, 66 feet wide, and one of the leading thoroughfares connecting Toronto with Parkdale. The respondents are the owners and occupiers of property fronting Queen Street, near the point of intersection, the

(1) 4 Law Rep. 4 P. C. 98.

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property in the one case being in Toronto, in the other in Parkdale.

At the date of the commencement of the operations which led to this litigation, Queen Street was crossed on the level at the point of its intersection with Dufferin Street by the main lines of four railway companies.

On the 1st of February, 1883, on the representation of Toronto and Parkdale that this level crossing was dangerous to public safety, an Act was passed by the legislature of Ontario empowering the two municipalities, by agreement with the four railway companies, to alter the level crossing in Queen Street by carrying the roadway under the railways, and provision was made for compensating, at the expense of the municipalities, the owners and occupiers of property which might be taken for the purposes of the proposed alteration, or injuriously affected by the execution of the necessary works.

With regard to this statute, it is sufficient to say that, in the opinion of their Lordships, it did not empower either municipality, without the consent of the other, to effect the proposed alterations in Queen Street.

In the result, the two municipalities were unable to come to an agreement, and therefore it became impossible to effect the proposed alteration under the powers of the Ontario Act.

In this state of things, Parkdale applied to the railway committee of the Privy Council. The powers of the railway committee in respect of level crossings are defined by sect. 4 of the Dominion statute, 46 Vict. c. 24, passed on the 25th of May, 1883, which repealed the 48th section of the Consolidated Railway Act, 1879, substituting for it the following provision:—

"In any case where any portion of a railway is constructed or authorized or proposed to be constructed upon, along, or across any turnpike road, street, or other public highway on the level, the railway company before constructing or using the same, or in the case of railways already constructed within such time as the railway committee of the Privy Council of Canada shall direct, shall submit a plan and profile of such portion of railway for the approval of the railway committee, and the railway committee, if it appears to them necessary for the public safety, may from time to

time, with the sanction of the Governor in Council, authorize and require the company to whom such railway belongs, within such time as the said committee directs, to carry such road, street, or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as, under the circumstances of the case, appear to the said committee the best adapted for removing or diminishing the danger arising from the position of the railway, or to protect such road, street, or highway by a watchman, or by a watchman and gates, or other protection, and all the provisions of law at any such time applicable to the taking of land by railway companies, and its valuation and conveyance to them and compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the railway committee. For each and every day after the expiration of the date for the completion of the works fixed by the railway committee during which the works remain uncompleted, the company shall forfeit and pay to Her Majesty a penalty of fifty dollars, to be recovered by information, with costs of suit in the Exchequer Court of Canada, by the Attorney-General on behalf of Her Majesty."

Pending the application to the railway committee a memorandum of agreement was made between Parkdale and the four railway companies, to the effect that Queen Street should be carried under the line of the railway; that, in the subway, the roadway of Queen Street should be narrowed to 40 feet; that Parkdale should take the control of the proposed works, with power to let contracts; that the work should be carried out under the direction of the engineer appointed by the four railways; and that Parkdale should bear one fifth of the cost of the proposed works, the remaining cost being borne by the four railway companies.

It was argued that this agreement was ultra vires the municipality of Parkdale. But it has frequently been pointed out that the doctrine of ultra vires must be applied reasonably and not unreasonably, and it does not appear to their Lordships that, under the circumstances, there was anything ultra vires in the agreement in question.

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On the 21st of September, 1883, the railway committee of the Privy Council made a report in the matter, which was afterwards duly approved by the Governor in Council. The report stated that the committee deemed it necessary for public safety that the four railway companies be authorized and required to carry Queen Street under their railways by means of a bridge or subway, with the necessary approaches thereto. Other provisions of the report were in accordance with the memorandum of agreement between the railway companies and Parkdale, which was referred to in the report, and it was provided that the works were to be completed on or before the 1st of March, 1884, and the whole were to be in accordance with plans to be approved by the railway committee.

The municipality of Parkdale and the four railway companies then entered into a formal agreement embodying the memorandum referred to in the report of the railway committee. The agreement was ratified and confirmed by the ratepayers of Parkdale. Parkdale let the contract for works to one Godson, who immediately commenced operations.

The effect of lowering the roadway in front of the property belonging to the respondents was to deprive them of the access to Queen Street which they had previously enjoyed, and to injure their property very seriously.

No notice was given to them that the works were being carried out under the order of the railway committee, and no compensation was offered to them by the railway companies or by the municipality of Parkdale.

Being apparently under the belief, as they well might be, that the works were being carried out by the municipalities of Toronto and Parkdale under the Ontario Act, and finding that no steps had been taken for providing compensation as required by that Act, the respondents brought their actions against the two municipalities, asking for an injunction to restrain them from interfering with their rights, and also asking for a mandatory injunction and for damages.

The two municipalities simply traversed the allegations of fact in the respondents' statement of claim.

When the actions came on for trial the appellants set up by

way of defence that they were acting under the powers of the railway companies, who were set in motion by the order of the railway committee, and the pleadings were then amended for the purpose of bringing this defence before the Court. The railway companies, however, were not made parties to the action. Their Lordships regret this omission, for which, in their Lordships' opinion, both parties are equally to blame. It has probably led to unnecessary expense, and to an undue prolongation of the litigation, which certainly might have been disposed of more satisfactorily in the presence of the railway companies. However, the absence of the railway companies does not relieve the appellants, who claim to have acted as agents, from the obligation of shewing that their principals were duly authorized to do the acts complained of.

Before the Colonial Courts various points appear to have been raised and argued which led to much diversity of opinion. But before their Lordships, after some discussion, the argument was mainly confined to the question whether the railway companies were duly authorized to proceed with the works, a question which, unfortunately, does not appear to have been dealt with in any of the able and elaborate judgments pronounced in the Courts below.

This question in their Lordships' opinion turns upon the true construction of the 4th section of the Dominion Act of 1883.

In the opinion of their Lordships, an order of the railway committee under this section does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's rights.

The questions therefore to be considered are:—

1. What were the provisions of law applicable to the case?

2. Did the four railway companies duly comply with those provisions?

The provisions of law at the date of the order of the railway committee "applicable to the taking of land by railway companies and its valuation and conveyance to them and compensation

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therefor" are to be found in the Consolidated Railway Act, 1879.

In the opinion of their Lordships these provisions include the provisions contained in that Act for compensation in respect of land injuriously affected though not actually taken. Those provisions are so intermixed with the provisions applicable to the taking of land strictly so called, that their Lordships think they may be properly included under the head of "Provisions of law applicable to the taking of land." Indeed, it would be against the interest of railway companies to adopt the narrow construction which was contended for at the bar, inasmuch as if their Lordships' view as to the construction of sect. 4 of the Act of 1883 be correct, and the order of the railway committee of itself gives no power to interfere with private rights, it would be necessary for railway companies, if they could not agree with respect to compensation for lands injuriously affected, to purchase those lands outright.

The provisions of the Consolidated Railway Act, 1879, which are brought into operation by the order of the railway committee include, in their Lordships' opinion, all the provisions in that Act contained under the headings of "Plans and surveys" and "Lands and their valuation," which are applicable to the case.

The provision as to the deposit of a map or plan and book of reference is, in their Lordships' opinion, undoubtedly applicable. Without such plan and book of reference no notice whatever would be given to persons whose lands may be taken or injuriously affected in consequence of the order of the railway committee. By the Act, the deposit of the plan and book of reference and notice of such deposit in a newspaper is made general notice to all parties concerned, and it is the foundation of all steps for assessing compensation. Until the map or plan and book of reference are deposited it is enacted, sect. 8, sub-sect. 8, that the execution of the railway or part of the railway in question shall not be proceeded with. It may be observed that when further space is required for station accommodation, and the provisions as to a plan and book of reference are not needed because special notice is in the first instance to be given to the parties concerned, those provisions are specially excluded, although only the section

headed "Lands and their valuation" is expressly incorporated (sects. 10, 11, 12).

In the present case it is admitted that no plan or book of reference relating to the alterations required by the railway committee has been deposited.

It appears to their Lordships, therefore, that the railway companies have not taken the very first step required to entitle them to commence operations.

With regard to the provisions for compensation contained in sect. 9, under the heading of "Lands and their valuation," it appears to their Lordships that there is a marked difference between the provisions of the Dominion Act and those of the English Lands Clauses Consolidation Act, 1845, and that decisions upon the English Act, such as *Hutton* v. *London and South Western Railway Company* (1), which was referred to in the argument, afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed on precisely the same footing. Compensation must be paid before the land is taken or the right interfered with. This appears to be clear from sub-sects. 27 and 28. On payment or legal tender of compensation, which may be arrived at by arbitration or by agreement, the award or agreement vests in the company, "the power forthwith to take possession of the lands, or to exercise the right or to do the thing for which such compensation . . . . has been awarded or agreed upon," and resistance or forcible opposition is then to be put down by the strong arm of the law. But before award or agreement, although immediate possession of the lands, or of the power to do the thing which is to be the subject of compensation, may be urgently required, no warrant is to be granted for quieting possession and putting down opposition unless ten days' notice has been served on the parties interested, and the prescribed security is given for payment of the probable amount of compensation. If the contention of the appellants were correct, the payment of compensation, or the giving of security as prescribed by the Act, is not a condition precedent, there would be this singular result, that the railway company might be legally in possession of land, or legally

(1) 7 Hare, 259.

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interfering with the rights of individuals, and yet they would not be able to obtain the protection of the law unless and until they had taken certain steps which, according to the contention of the appellants, are not required to give legal validity to their acts.

Their Lordships, therefore, are of opinion that the railway companies were bound to make compensation under the Act of 1879 before interfering with the respondents' rights, and on this ground, as well as on the ground of non-compliance with the provisions of the Act as to plans and surveys, they hold that the appellants cannot justify their acts by pleading the statutory authority of the railway companies.

Mr. Jeune, in his reply, referred to the case of *Jones* v. *Stanstead Railroad Company* (1), which was before this Board in 1872. He pointed out that many of the provisions of the Railway Act then under consideration were identical with the provisions of the Act of 1879, and he contended that their Lordships were bound by that decision to hold that in the present case compensation was not a condition precedent.

Their Lordships consider that *Jones* v. *Stanstead Railroad Company* (1) is not an authority for that contention. The circumstances of that case were very peculiar. The appellant, who was the plaintiff in the action, was the owner of a bridge over the river Richelieu, which had been built under the powers of an Act of Parliament, and had certain privileges and a sort of statutory monopoly within certain defined limits. Within those limits, under the powers of their Act, the railroad company constructed a railway bridge. The plaintiff complained of the construction and use of the railway bridge as an invasion of his rights, and brought an action for the demolition of that bridge, which was said to be the proper mode of claiming damages in such a case. On appeal the plaintiff's claim was mainly founded on the authority of *Reg.* v. *Cambrian Railway Company* (2), which was supposed to be distinguishable from the case of *Hammersmith Railway Company* v. *Brand* (3), but which was afterwards overruled in *Hopkins* v. *Great Northern Railway Company* (4).

Undoubtedly the provisions of the Act of 1879 as to plans and

(1) Law Rep. 4 P. C. 98.
(2) Law Rep. 6 Q. B. 422.
(3) Law Rep. 4 H. L. 171.
(4) 2 Q. B. D. 224.

surveys, and as to compensation for lands taken or injuriously affected, and the important provisions of sect. 9, sub-sects. 27 and 28, are to be found in the Railway Clauses Consolidation Act of Canada, 14 & 15 Vict. c. 51, which was incorporated in the special Act of the Stanstead Railroad Company. But it is to be observed that the company's special Act also incorporated clause 4 of 14 & 15 Vict. c. 51, which is a general provision as to compensation, corresponding with clause 6 of the English Railways Clauses Consolidation Act, 1845, and which is not to be found in the Act of 1879. This clause apparently was treated as qualifying the other clauses of the Act 14 & 15 Vict., at any rate as regards compensation for damage caused by the working of the railway, assuming that such damage could be the subject of compensation. It was pointed out in the judgment that it was not the construction of the railway bridge, but the use of it when constructed for the conveyance of traffic, which injuriously affected the privilege of the appellant, and gave him, if at all, the right to compensation, and their Lordships expressed their opinion that it was not a reasonable construction of the statute under consideration to imply as a condition precedent that compensation must be paid *for such consequential injuries* before doing the work. And the appeal was consequently dismissed.

Their Lordships do not consider that this decision conflicts with the opinion they have expressed in the present case.

It was urged that if compensation was to be paid in respect of rights over land interfered with by the construction of a railway as a condition precedent before doing the work, railway companies would be liable to be treated as wrongdoers in a variety of cases, and would be seriously hampered in exercising their statutory powers.

Their Lordships do not feel pressed by this difficulty. The cases in which railway companies, in the construction of their railway, unwittingly interfere with the rights of other persons must be very few. In the present case, certainly, the interference complained of is not due to any inadvertence.

If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not

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interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood* v. *Charing Cross Railway Company* (1), the granting an injunction which stops the works of a railway company is not merely a question between the plaintiff and the company. The public have an interest in the matter. As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.

Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.

Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment.

In the result, their Lordships will humbly advise Her Majesty that the appeal must be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Robinson, Poole, & Robinson.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, & Coxe.*

(1) 33 Beav. 290.

[PRIVY COUNCIL.]

THE BANK OF MONTREAL . . . . . DEFENDANT;

AND

SWEENY . . . . . PLAINTIFF.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Quebec—Transfer of Shares—Holder "in trust"—Notice—Liability of Transferee.

A holder of shares "in trust" is not a mandataire prête-nom and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony, a transferee from such holder is bound to inquire whether the transfer is authorized by the nature of the trust.

APPEAL from a decree of the Supreme Court (June 22, 1885) reversing a decree of the Court of Queen's Bench for Lower Canada (Sept. 25, 1884), which confirmed a decree of the Superior Court at Montreal (Dec. 24, 1881) dismissing the respondent's action as far as the appellant was concerned with costs.

The action was brought by the respondent against W. J. Buchanan, the manager of the Bank of Montreal; the Bank; James Rose; and the Montreal Rolling Mills Company, a body politic and corporate.

The question in the appeal was whether the respondent was owner of and entitled to have transferred to her thirty shares of the Montreal Rolling Mills Company, at the date of action held by or on behalf of the Bank.

In her declaration the respondent alleged that in the beginning of the year 1871 she directed James Rose to invest $3000 belonging to her in the purchase of three shares of the Montreal Rolling Mills Company of the par value of $1000 a share; that in April, 1871, she paid James Rose $3000 for the above purpose, and James Rose acting as agent for her paid the same to that company; that on the 11th April, 1871, the company issued a certificate to the effect that James Rose, in trust, was holder

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of three shares fully paid of the par value of $1000 each in the company, and that the shares were transferable only on the books of the company in person or by attorney; that James Rose then delivered the certificate to the respondent, who continued to hold the same; that the par value of the shares was on the 28th of January, 1874, altered from $1000 to $100 each, so that the said three shares were afterwards represented by thirty; that on the 3rd of June, 1876, and the 13th of March, 1879, James Rose, without the knowledge or consent of the respondent, transferred the said thirty shares to Wentworth J. Buchanan in trust for the appellant; that the fact of the thirty shares represented by the certificate being held by James Rose in trust was known to the appellant, and that the appellant was put by the certificate on inquiry; that the transfer of the shares was made without the surrender of the certificate (which always to the knowledge of the appellant remained in the possession of the respondent) to Buchanan in trust for the appellant as security for a debt of James Rose to the appellant; and that on the 27th of January, 1881, the respondent protested against the transfer and claimed the said shares from the appellant.

The plea of the appellant stated that James Rose being indebted to the appellant in a sum exceeding $30,000, transferred 250 shares of the Montreal Rolling Mills Company, of the par value of $25,000, to the appellant as security for such debt, which remained unpaid; that the appellant was ignorant whether the shares claimed were part of the said 250 shares, and that no trust was disclosed to them of such shares, James Rose dealing with them as his own property. The plea further contained a general denial of the allegations in the declaration. James Rose, the Montreal Rolling Mills Company, and Buchanan, did not plead.

Rainville, J., decided that the thirty shares claimed were part of those transferred by James Rose to Buchanan. But he held that the transfer was made to secure future advances to James Rose from the appellant; that the remittance of the $3000 to James Rose constituted a depôt irrégulier, and had the effect of giving him property in this sum; that proof of deposit in civil matters as regards a third party can be made only by writing; that the fact that James Rose entered his name as subscriber of the shares had not the effect as regards a third party of rendering

the respondent owner of the shares; that the addition of the words "in trust" did not withdraw the shares from the claims of James Rose's creditors; that inasmuch as the property was not stated to belong to any individual by name, other than James Rose, third parties were justified in dealing with James Rose as if it were his; and that the certificate was immaterial except as a memorandum, inasmuch as the shares did not pass by its transfer.

In appeal, Dorion, C.J., Monk, Baby, Doherty, and Caron, JJ., decided unanimously in favour of the bank, dismissing the plaintiff's appeal. The Chief Justice held, that there was nothing in the evidence to shew that James Rose was directed to invest the moneys he received for the respondent in the Rolling Mills Company, or that he was requested to invest them at all, and further, that this could not be proved by verbal testimony. The learned judge also held that the mere addition of the words "in trust" did not divest James Rose of the control and disposition of the shares, as there was no cestui que trust disclosed and no acceptance of any trust.

In the Supreme Court, Ritchie, C.J., Fournier, Henry, and Taschereau, JJ., Strong, J., dissenting, decided in favour of the plaintiff. They declared her to be the owner of the shares, and ordered the appellant to transfer them to her, and in default to pay her $3900 the value of the shares, with interest and costs.

Sir *H. Davey*, Q.C., and *Jeune*, for the appellant, contended upon the evidence that it was not proved that the respondent gave Rose a mandate to buy the shares, or ratified the purchase thereof before the transfer to Buchanan, or deposited the purchase-money with him. Oral evidence was not admissible under the circumstances of the case, which was not one of a commercial nature, to the above effect, for there was no commencement de preuve in writing to establish that the money belonged to the respondent, or that she had anything to do with it. See *Darling* v. *Brown* (1); Civil Code (P. Q.) art. 1233, sub-s. 7; Code Napoléon, art. 1347; *Price* v. *Neault* (2). Assuming, however, that a mandate was proved, it did not result that the doctrines regulating English

(1) 1 Sup. Court of Canada Rep. 360. (2) 12 App. Cas. 110.

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trusts should be applied to the case. The property in the shares became thereby vested in Rose as a mandataire prête-nom, whose legal powers according to French law are unlimited; that is, he has full power of disposition, and third persons acquiring rights in or title to the shares from him are not considered to be in bad faith, or in any way affected by notice. The principal has his remedy against his mandatory only, not against third parties dealing with them in reliance on his absolute power of disposition. Reference was made to an arrêt of the Court of Cassation in *Richaud* v. *Lécurieux* (1); Troplong, Du Mandat, No. 43; Dalloz, Jurisprudence Générale, vo Mandat, sect. 199. Besides, there was no implied notice in the words "in trust." Those words do not sufficiently indicate an undisclosed principal or cestui que trust. They did not prevent Rose from giving a good title, for they went no further than to shew a relationship with third persons not extending to affect his powers of disposition or his right to receive the proceeds. *City Bank* v. *Barrow* (2) is distinguishable.

Kerr, Q.C. (Canada), for the respondent, contended that it was proved that Rose held the shares under circumstances which rendered him trustee for the respondent; and that if a commencement de preuve in writing was required it had been given. The main contention for the appellant, that under the Quebec law no such doctrine as that regulating trusts in England is known, and that the words "in trust" virtually have no meaning, was denied. It was contended that the law of Quebec on this subject was the same as in England, and that the English authorities and cases applicable to breach of trust were applicable to this case. The legal principles of all laws are the same on this subject: it is only in the application that differences arise. Reference was made to *City Bank* v. *Barrow* (2). By Rose's purchase the shares were vested in the respondent. The register gave express notice to any intending purchaser that Rose held them "in trust," that is, that he was not the owner, real or apparent, and it followed that a purchaser in order to be safe should inquire who had the beneficial title.

(1) Dalloz, 1864, part i. p. 282.

(2) 5 App. Cas. 664.

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Whatever the powers of a mandataire prête-nom, Rose was not an agent of that character, he was held out to the world as owner "in trust." By Canadian law, property obtained by fraud can be followed into the hands of a third party. A purchaser of that which is ear-marked as trust property is bound to ascertain if the trustee has the right to alienate: *Shaw* v. *Spencer* (1).

Sir *H. Davey*, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HALSBURY, L.C.:—

Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the company's books; that he transferred them to the bank in breach of his trust; that at the time of the transfer the bank knew of Rose's position; and that the plaintiff turns out to be the person in whose favour the trust existed.

It has been argued for the appellants that these things are not proved, because they require a written commencement de preuve, and have not got it. But on this point their Lordships stopped the respondent's counsel. They are quite clear that if a written commencement is needed, it is to be found in the letters of Crawford and Lockhart coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd of June, 1876.

Under these circumstances the question arises whether the bank must not be in the same position as if they had known that the plaintiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the bank, for those gentlemen may be guilty of nothing more than a mistake of law. Nor do they think it necessary to examine how far the relations between Rose and the plaintiff may have resembled or differed from those of an English trustee and his beneficiary, or to go into the English doctrines of constructive fraud, or constructive notice. The bank had express notice that, as regards the property transferred to them, Rose

(1) 100 Mass. 389.

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stood to some person in the relation expressed by the words "in trust," and the only question is what duty was cast upon the bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorized by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim.

Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbad that property should be placed in the name of a person, with a simultaneous notice providing that his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to mandataires prête-noms, and are to the effect that, when once property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a mandataire prête-nom, for they find no definition or description of such an agent which does not require that he should have a titre apparent, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to shew that an agent can be a mandataire prête-nom when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority.

Then it was argued that the words "in trust" do not shew a

title in any other person, and that they might be merely a mode of distinguishing one account from another in the company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly shew the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It is worthy of remark that, in their plea, the appellants claim to be the true owners of the shares upon the very same principle upon which the plaintiff's claim is founded. Rose did not transfer them to the bank by name, but to Buchanan "in trust." The appellants aver that this transfer was made as security for a debt due from Rose to them, and that the shares "are now legally held for the said bank."

If that is the essential truth of the transaction as between Buchanan and the bank, why should it be otherwise as between Rose and the plaintiff?

The result is that their Lordships agree in all material points with the Supreme Court of Canada. They will humbly advise Her Majesty to affirm the decree of that Court, and dismiss the appeal. The appellants must pay the costs.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, & Cox.*
Solicitors for respondent: *Simpson, Hammond, & Co.*

[PRIVY COUNCIL.]

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THE HEIRS HIDDINGH . . . . . PLAINTIFFS;

AND

DE VILLIERS DENYSSEN AND OTHERS . DEFENDANTS.

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AND

DENYSSEN AND OTHERS . . . . . DEFENDANTS.

DENYSSEN . . . . . DEFENDANT;

AND

WILLEM HIDDINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope—Liability of Executors—Duty to convert within Six Months — Reasonable Discretion — Act XVII. of 1875 *and Bye-laws thereunder—Right of any Beneficiary to Relief.*

An executor's discretion is not that of an absolute owner: it is limited by the duty of bringing the assets into a proper state of investment within a reasonable time; the onus is upon him to shew that he has acted bonâ fide and has exercised a reasonable discretion.

Where the testator's assets were subject to trusts in favour of unborn persons and consisted in part of shares with unlimited liability, and the executors delayed conversion after the same was demanded by those beneficially interested:—

Held, that they were liable for the value of the shares ascertained at a reasonable date from the death of the testator, which in this case was fixed at six months.

Held, that, according to the true construction of his will the testator's gift of £500 to each of his executors in full satisfaction did not preclude charges made by them in their character, also conferred by the will, of administrators of his fidei-commissary inheritance.

It is not the duty of executors to turn the whole estate into money; their duty is to liquidate it, that is reduce it into possession, cleared of debts and outgoings, and so left free for enjoyment by the heirs, and to hold any trust fund separate from their own:—

Held, that under the bye-laws framed under Act XVII. of 1875 the

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association governed by that Act is not debarred from administering a testator's assets separate from its own property, and is not empowered (even if bye-laws to that effect would be reasonable) to sell to itself the assets, and to remain accountable only for the price, which by the general law it is incapable of doing; and it is competent for any beneficiary, though interested only to the extent of a life interest in a share, to sue for relief.

Beningfield v. *Baxter* (ante, p. 167) approved.

THE three above appeals were consolidated (ante, p. 107).

The first was from a decree of the Supreme Court (Jan. 14, 1884); the two others from a decree (July 13, 1885) in an action brought on the 5th of May, 1885.

The facts are stated in the judgment of their Lordships.

The first appeal raised the questions as to the right of the appellants (the heirs) (1) to recover from the respondents damages for their neglect in selling and disposing of certain shares in banking and other public companies, forming part of the estate of the testator Petrus Hofstede Hiddingh, with due diligence and within a reasonable time after the death of the testator; (2) to have certain liquidation accounts framed by the respondents in the month of October, 1883, amended by the striking out of the said accounts certain items charged therein for advertising, and calling for tenders for the said shares and for interest paid to the purchasers of the said shares; and (3) to have the costs of the action paid by the respondents.

In the second appeal the questions were whether the association were bound to invest the fidei-commissary estate in separate securities, and to keep the same distinct from their own funds, or to pay to the appellant any higher interest than 5 per cent. on the amount of his share; and whether the sum of £500 bequeathed to and accepted by the association was in full satisfaction of all charges and commission in respect of the administration of the estate (as distinguished from the executorship).

In the third, which was a cross appeal, the question was whether the Court was right in disallowing the deduction of the guarantee commission of 2½ per cent. from the entailed portion of the appellant's share.

Rigby, Q.C., and *Haldane*, for the heirs of the testator, contended that there had been negligence on the part of the executors in

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not selling the shares mentioned within a reasonable time and with due diligence. They were consequently liable to make good the loss which had resulted from their not obtaining the price which those shares would have fetched if sold at a reasonable interval after the testator's death, and also to make good the damages which their negligence had occasioned, such as those for advertising and obtaining tenders and for interest. There was no absolute rule as to the time within which the executors should realize. At the Cape there was certainly no greater latitude, there appeared to be greater stringency with regard to the duties of executors in that respect, and six months would be a reasonable time. Reference was made to Reg. No. 104 of 1833, which regulates the administration of wills: see especially sect. 28; and to *Buxton* v. *Buxton* (1). With regard to the duty of executors in respect of shares with unlimited liability, reference was made to *Grayburn* v. *Clarkson* (2), *Sculthorpe* v. *Tipper* (3), and *In re Norrington* (4); in respect of shares with limited liability, to *Hughes* v. *Empson* (5) and *Marsden* v. *Kent* (6). With regard to the remuneration of the executors they were not entitled to make any charges, having regard to the terms of the will, which bequeathed to them £500, a sum which they had accepted in full satisfaction of any fees or commission to which otherwise they might have been entitled. Reference was made to the Ordinance of 1833, No. 104, sect. 37; Acts VI. of 1836, IX. of 1855, XVII. of 1875, especially sects. 41, 43, and to the bye-laws framed thereunder Nos. 16 and 17.

Further, the association did not, as they were bound to do, keep the securities forming part of the testator's estate separate and distinct from the proper assets of the association; but wrongfully took a cession of those securities and charged a guarantee commission besides, regardless of the fact that the cession, if valid, made them debtors and not guarantors to the estate for the value thereof.

Sir *Horace Davey*, Q.C., and *Mackarness*, for the respondents, contended that there had been no negligence on the part of the

(1) 1 My. & Cr. 80.
(2) Law Rep. 3 Ch. 605.
(3) Law Rep. 13 Eq. 232.
(4) 13 Ch. D. 654.
(5) 22 Beav. 181.
(6) 5 Ch. D. 598.

executors in liquidating the estate, but that they had exercised a reasonable discretion. There is no case in which the Court has ever charged executors with what is at most an error of judgment. The duty of executors under Roman-Dutch law is to convert everything into money, even leasehold estate, unless the residuary legatees consent to the contrary so far as they are interested. Reference was made to the cases cited by the appellant, and to Lewin on Trusts, 7th ed., p. 265, ch. xiv., s. 1, par. 1; *Sculthorpe* v. *Tipper* (1) is not to be relied on. It is open to Mr. Lewin's criticism as to its harshness. It is not laid down in *Grayburn* v. *Clarkson* (2) that executors are bound by a hard and fast rule to sell in twelve months. It rules that unless they sell in twelve months they must shew that they exercised a bonâ fide discretion. And generally where executors allow matters to slide without exercising any judgment they are liable, not where they exercise a bonâ fide judgment, however mistaken.

The law at the Cape did not differ from that laid down in England, that there is no inflexible rule as to the time within which executors must get in the assets of an estate. Ordinance No. 104 of 1833, sect. 33; Act XIV. of 1864, sect. 1. The office of an administrator is not the same as that of an English trustee. The doctrine of dual ownership is unknown to the Roman-Dutch law and to the Roman law; Juta's Translation of Van der Linden's Inst. of Holland, pp. 62, 72, 73. The cession of bonds by the respondents as executors to themselves as administrators is legal and in accordance with the practice at the Cape: *Mostert* v. *South African Association* (3). The method adopted by the respondent of dealing with assets of estates administered by them is that prescribed by their own bye-laws, Nos. 16 and 17, made in pursuance of Act XVII. of 1875. The practice is the same as that adopted by the Guardian Fund under the charge of the Master of the Supreme Court and by the old Orphan Chamber which preceded it. The testator as a shareholder in the defendant association was well acquainted with their practice and with the charges made by them and desired that his estate should be guaranteed by them in the usual way. He gave no directions as to invest-

(1) Law Rep. 13 Eq. 232. (2) Law Rep. 3 Ch. 605.
(3) Buch. Rep. 1868, p. 294.

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ment of his estate, see the will and evidence of respondent's witnesses. The complaint of negligence was considered and decided in a former action and cannot now be raised.

Rigby, Q.C., replied.

July 9. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These appeals all relate to property subject to the trusts of the will of Petrus Hofstede Hiddingh, and all the questions raised by them lie between persons entitled to his estate on the one hand, and his executors or administrators on the other. They have therefore been heard together, but the decrees appealed from were made in two separate actions raising separate issues, in which it will be proper now to make separate decrees.

The testator's will bears date the 13th of July, 1876. He first gave to his wife the sum of £7500, entailed with the burthen of fidei-commissum, under which the interest is to be enjoyed by her for life, with remainder to his children for their lives, with remainders to their issue. He then appoints his seven children by name and any future children to be sole heirs and heiresses of his estate after payment of the legacy, but as to one half of their shares burthened with the entail of fidei-commissum, under which they are to enjoy the interests of their shares for life, with remainder to their issue. It is not material to state the nature of the interests ulterior to those of the children. He further directs—

"That his three executors hereinafter appointed shall receive, by way of commission, each the sum of five hundred pounds sterling, and that his estate shall be charged with guarantee commission, and not his wife, on the bequest of seven thousand and five hundred pounds sterling bequeathed to her."

And he declares—

"To nominate and appoint Mr. Paul de Villiers, D.A., son, his wife Dorothea Wilhelmina Christina Anthing, and the South African Association for the Administration and Settlement of Estates, and in case the last-mentioned executor declines to

accept the appointment, then and in that case the Colonial Orphan Chamber and Trust Company in its stead, to be the executors of his will, administrators of his estate and effects, and guardians of his minor heirs and legatees."

On the 12th of May, 1881, the testator made a codicil, in which he enlarges the entailed portion of the inheritances from one half to three quarters of each share. And he continues as follows :—

"I hereby revoke the appointment of the South African Association for the Administration and Settlement of Estates as the sole administrators of the fidei-commissary inheritances of my heirs under this will and codicil, and desire that the said South African Association and the Colonial Orphan Chamber and Trust Company shall have the joint administration of the said fidei-commissary inheritances devolving upon my said heirs, that is to say, that each institution shall have the administration of half the amount of the fidei-commissary inheritance devolving upon each of my heirs.

"I further desire that the sum of five hundred pounds, bequeathed to each of my executors by way of commission, shall be in full satisfaction of any commission or fees which they may be entitled to under this will."

On the 13th of September, 1881, the testator died, leaving his wife and seven children surviving him, and on the 13th of October letters of administration were granted to his three executors. The South African Association has been the acting executor, though the others are of course responsible for the due liquidation of the estate.

First Appeal.

The first action was brought by four of the testator's children against the three executors. It was commenced by summons dated the 16th of November, 1883. The plaintiffs thereby claimed to amend the defendants' accounts by expunging certain items relating to the sale of shares, and also claimed damages sustained on the sales of certain shares and debentures. In their declaration the plaintiffs stated that part of the testator's estate consisted of shares in companies; that for a considerable

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time after his death the shares were in public demand, and profitable prices might have been obtained for them; that the defendants did not dispose of any of the shares till the 14th of July, 1883, when they sold some at prices far less than might have been obtained earlier; and they claimed £1138 17*s.* 6*d.* as damage on account of the negligence charged. The plaintiffs make out their claim in the way shewn by a table set out in the appellants' case, which is here transcribed:—

Shares.	Market Value (claimed by Plaintiffs.)	For what Executors sold in 1883.	Deficiency.
	£ *s.*	£ *s.* *d.*	£ *s.* *d.*
34 South African Bank	At £35 0 = 1190 0	20 at 13 5 = 265 14 at 11 0 = 154 } 419 0 0	771 0 0
15 National Bank, O.F.S.	„ 6 10 = 97 10	At £4 17*s.* — 72 15 0	24 15 0
23 Gas Light Company	„ 35 0 = 895 0	„ £30 12*s.* 6*d.* 704 7 6	100 12 6
2 Board of Executors	„ 300 0 = 600 0	1 at £187 1 at £176 } 363 0 0	237 0 0
10 Brick and Lime Company.	„ 1 11 = 15 10	At £1 — — 10 0 0	5 10 0
	£2708 0	£1569 2 6	£1138 17 6

The price of the various shares (except those of the Brick and Lime Company) in November, 1881, and again in April, 1882, was stated by certain brokers called by the plaintiffs. It was shewn that in November, and again in December, 1881, the association invited tenders for the shares, which resulted either in nothing or in offers at prices which they considered inadequate. After December, 1881, they made no attempt to dispose of the shares, except by offering them for the acceptance of the adult heirs. It does not appear in what form or at what date this offer was made. It was probably made in conversation, and shortly before the date of the answer to it. That answer is contained in the following letter, addressed to Mr. Denyssen as the secretary of the association, and as administering executor:—

"Estate, late P. H. Hiddingh.

"Cape Town, 3rd April, 1882."

"Sir,—With regard to bank and other shares belonging to the above estate, about which the executors desire to know the

intention of the heirs, we, the undersigned, have come to the resolution not to take over any of them, and therefore request the executors to dispose of the same as soon as possible."

The letter is signed either by five of the children, or by four and the widow.

The executors did nothing whatever after the receipt of this letter. Mr. Denyssen says, "When the heirs asked us to sell, the board thought it not desirable." Two of the directors say the matter was continually discussed at the board, and one of them, Mr. Ebden, says; "We thought that, short of dire necessity, it would be undesirable to realize the shares with a falling market, and a reasonable prospect of a rise at no distant date." There is no other reason given for their inaction, nor any evidence as to the reasons for expecting a rise. In point of fact they did not sell till July, 1883, after they had been warned by the plaintiffs' solicitor that they would be held responsible for loss.

Upon these facts the Supreme Court made their decree on the 14th of January, 1884, and thereby dismissed the action on the ground that the executors did no more than exercise a discretion which was vested in them. It gave the costs out of the estate. This is the decree appealed from.

It seems that no rule has been laid down in the Colony equivalent to the arbitrary but convenient rule adopted by the Court of Chancery here, that a year should be taken as the ordinary reasonable time within which an executor should realize investments which it is not proper to retain. It is suggested that in this colony six months would be a reasonable period, because that is the time by which it is expected that liquidation accounts shall be lodged, and after which any person interested may summon the executors for an account. The Chief Justice, with whom Mr. Justice Dwyer agrees throughout, adopts this view. Mr. Justice Smith, who dissented from the judgment and thought the executors were liable for negligence, considered that twelve months was a reasonable period, because after that time the master may of his own authority summon the executor to file his accounts. Their Lordships do not desire to be considered as laying down any general rule on this point. They think that, having regard to what passed in April, 1882, the executors

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having been called upon by the major portion of the heirs to do as soon as possible the duty which the law laid upon them, were bound to delay no longer. A sale as soon as possible after the 3rd of April, 1882, coincides very nearly with the six months which the Chief Justice lays down to be the reasonable time, and which would expire on the 13th of April. And their Lordships cannot find that, even if the longer period of a year were taken, the executors made any effort to sell during the remainder of that period.

The law applicable to the case is, their Lordships think, very well laid down by the Chief Justice. He says:—

"The correct view appears to me to be that, in the opinion of the legislature, six months is not as a general rule an unreasonable time to allow executors to realize, and that, under certain circumstances, twelve months and more may be perfectly reasonable. I would go even further, and say that where a loss has occurred through the failure of an executor to realize within six months of his acceptance of the trust, the onus would lie upon him of proving that he acted bonâ fide, and exercised a reasonable discretion. In deciding whether a reasonable discretion was exercised or not, the Court would look into all the circumstances of the case, such as the nature of the investment, the confidence the testator had in the investment, the efforts made by the executor to realize, the state of the market, and of course as an important ingredient the length of time which has elapsed since the testator's death. But I cannot concur in the view that, after the lapse of six months mere error of judgment would be sufficient to fix the executor with liability."

But it is not a mere error of judgment which is charged against the executors. They are charged with unreasonable delay and negligence in performing their legal duty. The Court appears to treat the discretion of the executors as if it were a perfectly free discretion like that of an absolute owner. It was vigorously contended at the bar by Sir Horace Davey that the true test of an executor's reasonable discretion is to see what a reasonable owner might do. But an executor's discretion is limited by the duty of bringing the assets into a proper state of investment

within a reasonable time. That duty was in this case rendered more imperative by the circumstance that in two sets of shares the liability is unlimited, and the circumstance that the inheritance is subject to trusts in favour of unborn persons, which must endure for many years, and for which investments of stable character are especially required. And it was a duty urged upon the executors by the greater part, if not the whole, of the adult heirs.

Their Lordships agree with the Court below that the onus lies on the executors of proving that they acted bonâ fide, and exercised a reasonable discretion. Against their good faith not an insinuation has been made. But, in their Lordships' opinion, they have not proved that they exercised reasonable discretion. Taking the tests propounded by the Chief Justice, we know nothing as to the confidence the testator had in the investments beyond the fact that he held them. But their nature was such as to demand conversion, the executors made no efforts to realize between December, 1881, and July, 1883; the state of the market was such as to create alarm, and the length of time was excessive.

On these grounds the executors must be held liable for loss, and then the question is what loss? The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got. Their Lordships have given their reasons for fixing an earlier date in this case, and they adopt the Chief Justice's term of six months. There is a trifling item of Brick and Lime Company's shares as to which there is no evidence to shew any loss. As to the other items their Lordships cannot find that the evidence supports the prices charged by the plaintiffs in their table; but the evidence of the brokers does shew some substantial loss upon the prices current some time in April, 1882. The proper course will be to order an inquiry what was the mesne market value of the shares of the four companies which the executors could have realized on the 13th of April, 1882, or as near thereto as can be ascertained, and to charge the executors

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with that value, with lawful interest from that date. The executors should also be disallowed the items of expense incurred after that date in connection with the shares, which are mentioned in paragraphs 2 and 5 of the second count of the plaint. On the other hand the executors should be allowed the amount of dividends accrued since the 13th of April, with interest, and also the price of purchase-money actually credited to the estate on sale of shares, with interest; also the shares themselves if any of them remain on the executors' hands.

As regards costs, having regard to the difficulty of the position, and the unimpeached good faith of the executors, their Lordships think that justice will be done by ordering the plaintiffs' costs of suit as between solicitor and client to be paid out of the estate, and by making no order with respect to the costs of the executors.

They will humbly advise Her Majesty in accordance with the foregoing opinion. And they will deal with the costs of the appeal on the same principle which they have applied to the costs of the suit.

SECOND AND THIRD APPEALS.

These are cross appeals in another action commenced on the 5th of May, 1885, by the testator's son, Willem Hiddingh, against the executors. Mr. Denyssen, as representing the association, is sued both as administering executor and as administrator. It will be convenient to deal separately with the several heads of relief sought in the action.

The plaintiff states that the defendants are in default for not enforcing contracts made on or after the 14th of July, 1883, for the sale of some of the shares which are the subject of the first action. If it were necessary to decide this issue, the action would fail, because the plaintiff brings no evidence to shew that it was expedient, or even possible, to enforce such contracts. But the result of the first action has now removed the ground for this portion of the second action.

The plaintiff then seeks relief in respect of 150 shares in the Cape Commercial Bank which the executors have not sold. The bank has failed, and the estate has been charged with the sum of

£5250 for calls, with a prospect of further calls. The defendants plead the decree in the first action as a bar to the second, and the Court has allowed the plea. It appears, however, to their Lordships that the first action was confined entirely to the shares which were sold in or after July, 1883, and in respect of which the sum of £1138 17*s.* 6*d.* was claimed as damages. The damage by retention of the Commercial Bank shares is a totally different matter, which was not and could not, as the declaration was framed, have been adjudicated in the first action. There is no evidence in the record that it was practicable to sell these shares, or that the estate would have escaped liability if they had been sold within a reasonable time, and the executors may, for aught that appears, have a complete defence on the merits. But the Court below declined to receive evidence or to go into the merits at all, on the ground that the question had been already decided between the parties. Their Lordships think that the case should be remitted to the Supreme Court for trial of the issue raised with respect to the Cape Commercial Bank shares.

Another complaint is that the association has charged commission against the fidei-commissary or settled estate, and is wrong in doing so, on the ground that the sums of £500 given to the executors must be taken in lieu of all commission or fees which they might otherwise claim in any character which the will confers on them. No doubt the codicil is capable of being read in this sense; but their Lordships agree with the Supreme Court in thinking that it is not the true sense. The testator clearly contemplated that a guarantee commission should be paid on the legacy given to his wife, and that is paid, not to his executors, but to his administrators. In the passage of his codicil which is relied on by the plaintiff he distinguishes correctly between executors and administrators, using the former term when he is thinking of the legacies of £500 and the latter when he is thinking of the fidei-commissary inheritance. The plaintiff's construction would create an inequality between the various trustees which it is impossible to think that the testator could have contemplated. The two executors who are not administrators would get £500 each for executorial duties alone, the company which is both executor and administrator would get the

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same sum for both sets of duties, and the company which is administrator but not executor would be left free to make its full charge. Moreover the testator was well acquainted with the bye-laws and the working of the association; and in the 17th bye-law, which provides for their remuneration, there are three distinct heads of charge, and the charges which relate to executorships are kept quite distinct from those which relate to more permanent trusts, such as fidei-commissary inheritances. Their Lordships hold without hesitation that the legacy given to the association does not preclude charges made by them in the character of administrators.

The remaining and the principal objections made by the plaintiff to the accounts rendered by the association are of a more complicated and difficult character. The liquidation accounts of the executors (and for the present purpose the association must be regarded as sole executor), shew that they have made over to the association and to the Orphan Chamber Company, as administrators and on account of the amounts entailed, a large number of mortgage bonds belonging to the testator. The Orphan Chamber Company are not parties to the action, and with their dealings we have now nothing to do. The association, it is said, have taken over mortgage bonds to the amount of £76,000. They claim to be the absolute owners of that property, and say that the estate can claim nothing from them but the amount of the principal debts secured by the bonds, with interest at 5 per cent. until payment. Further, for this process, they deduct at once what is called a "guarantee commission" of 2½ per cent. on the capital sum.

To put the matter into figures, for the sake of clearer illustration, the association take over securities, which are considered to be prime securities carrying 6 per cent. interest, say for £76,000; they have free use of that money; and because they become debtors for it and liable to pay it, they say they have guaranteed it, and charge £1900 down for the operation. Then, if they keep the money invested in prime securities carrying only 6 per cent., they take £760 a year for their administration. It is stated that the commission covers the expenses of administration, but it is not easy to see how there can be much expense when the adminis-

tration is reduced to the single process of paying half-yearly interest on the company's own debt.

When the plaintiff received from the association the accounts of his separate share he objected to this mode of treating the estate. He made both before action and by his action some other objections to the accounts which have not been urged at the bar. The claims which we have now to deal with are, first, that the cessions of the bonds shall be cancelled, with the consequence of disallowing the costs of those cessions; secondly, that the charge for guarantee commission shall be expunged; and thirdly, that the testator's assets shall be kept distinct from the other property of the association, and that the association shall account for the actual amount of interest received from those assets.

The Supreme Court have decided in favour of the plaintiff, that the association at all events cannot claim the guarantee commission during his life, but must pay him interest on his full share. And in favour of the association they have decided that they are entitled to treat the testator's assets as their own property, and are responsible only for the value at which they took those assets with 5 per cent. interest.

The association carries on its business under the authority of Act XVII. of 1875. They are empowered to make such charges as shall be agreed upon, or, when not agreed upon, as shall be just and reasonable. And the directors may frame and establish bye-laws in relation (amongst other things) to the charges made by the company, which bye-laws, after the observance of prescribed formalities, are to have the same force and effect as if inserted in the Act. They have made bye-laws to the validity of which no objection is taken except on the ground that they are not reasonable.

The important bye-laws are the 16th and 17th. The 16th, as before observed, is divided into three heads. That which relates to the present question is as follows:—

"In guardianships, fidei-commissary and trust money, and curatorships:—

"5 (five) per cent. on the receipts of interest, dividends, house rents, or other income.

"2½ (two and a half) per cent. on property or moneys taken

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over from executors, guardians, or others, by the association, and guaranteed by them.

"2½ (two and a half) per cent. for transcribing and guaranteeing inheritances, legacies, fidei-commissary inheritances, donations, and other bequests of whatever nature, from liquidation accounts of estates administered in this office to the separate accounts of the parties concerned.

"1 (one) per cent. on the appraised value of entailed immoveable property."

The 17th bye-law is as follows:—

"The association allow and pay interest half-yearly on all moneys administered by or entrusted to them either as executors, administrators, guardians, or curators. Such interest shall be at the rate of one per cent. less than the current rate of interest charged by the public companies at Cape Town at any time on bonds on security of landed property in this Colony."

The theory of the association was very clearly stated at the bar. It is the duty of executors, they say, to turn the whole of the estate into money; that they have properly done in the case of the bonds by selling them to the association at the full amount of the sums secured by them; the purchase-money is properly invested by being left in the hands of the association; the testator was very familiar with the practice of the association, and must be taken to have agreed to their charges when he made them his administrators; or if not, still their bye-laws are reasonable and are binding on all parties, and the bye-laws authorize the course adopted. They also contend that this course is in accordance with universal or at least very general, practice.

Their Lordships cannot assent to the first of this string of propositions. They have not been referred to any authority to shew that an executor must turn all the assets into money. It is laid down that his duty is to liquidate the estate. But an estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs. The startling theory broached on behalf of the association is discountenanced by the opinion of the Chief Justice, who says that an individual executor would be bound to keep the

trust fund separate and distinct from his own; therefore he could not be bound to go through the absurd process of turning proper investments into money, in order to put the money back again into proper investments. The same law must apply to companies who are appointed executors, and if any justification is to be found for the wholesale conversion effected in this case, it must be found in the special contract or circumstances, not in the general law.

That brings us to the construction of the bye-laws, which regulate the rights of the parties, unless at least they can be shewn to be unreasonable. Their Lordships do not think that the testator's connection with the association makes their charges "charges agreed upon" within the meaning of the Act, nor can they attribute to him any intention that the association should be paid except by lawful charges, or any intention that they should have advantages neither indicated by their bye-laws nor necessarily incidental to administration.

It is indeed argued that the bye-laws do not contemplate any administration of the assets in specie, and therefore compel, or at least authorize the course of turning them all into a simple debt due from the association. If, however, the effect of the bye-laws were that in every case there must be conversion of investments however unexceptionable into money for the mere sake of lending it to the association, their Lordships think they would be unreasonable. But the 16th and 23rd articles, which apply to administrations, clearly contemplate administration in specie, and so does article 12, though possibly that article may apply to agencies only. Not only is there nothing in the bye-laws to debar the association from administering the assets which the testator had separately from their own property, but their Lordships cannot find anything to warn persons dealing with them that their practice is to sell to themselves such part of the assets as they desire to hold, and to remain accountable only for the price.

If that is so, the effect of the cession in this case must be decided by the same tests as are applied to other acts of persons in a fiduciary position. Neither the form of the bonds nor that of the cessions is shewn in the record. It may be that a formal transfer in every case is proper for the purposes of administration, as, for example, if it become necessary to enforce payment,

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or if the debtor desires to redeem. It may be again that, in some cases, the money was wanted for strict executorial purposes, as for payment of debts or costs, and in those cases there could be no objection to the association making to themselves both a formal and a substantial transfer on paying the whole of the money secured. But the present controversy relates to the fidei-commissary inheritances, of which there can be no distribution until an absolute and unburthened interest has vested in the heirs or some of them. And the facts are that an executor has of his own mere will, without the consent of the adult beneficiaries, against the will of the only one whose wishes are in evidence, without the order of any Court, transferred to himself debts secured by specific charges on land, not making any payment for the transfer, but only giving to the owners of these debts an unsecured claim against himself, with the effect of putting large emoluments into his own pocket by the transaction. To hold that the beneficial ownership has been shifted from the heir to the executor by such a process seems to their Lordships to be a violation of the fundamental principles which are applied to fiduciary relations by every law with which they are acquainted.

It will be understood that their Lordships are confining themselves to the strict legal principle. They are not doubting the perfect stability of this company. It is clearly one that is regarded with great confidence in the Colony. For aught they know, to be inscribed in the books of the company as a creditor may there be considered as desirable a mode of investing money as the purchase of Bank of England stock is in England. They are not suggesting that estates may not, in some cases, benefit by such a process. It may be that, even in this case, others of the beneficiaries, or the co-executors if they had exercised any judgment in the matter, or a Court judging on behalf of infants or unborn takers would have approved or may still approve of such a process, either partially or wholly. But, as before said, the association is practically a sole executor. No one has interposed on behalf of the beneficiaries to correct any bias felt by the sole executor, or to adjust the balance of his judgment. And under such circumstances he cannot claim that a transfer by himself to himself shall stand.

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Then comes the question of the guarantee commission. If any guarantee had been given, their Lordships would feel difficulty in deciding the cross appeal on this point. They hardly understand whether the Supreme Court disallowed the immediate deduction of the commission on the ground that the bye-law does not authorize it, or that a bye-law authorizing it would not be reasonable, or that the testator could not have intended it. All these considerations are mentioned, and all with some degree of doubt. But it is needless now to go further into those questions, because no guarantee has been given. The very notion of a guarantee requires that there shall be two sources of security to the creditor, the original source and the guarantor. But, on their own theory, the association are the sole debtors of the estate. If they have used the word "guarantee" to apply to debts due from themselves and from nobody else, that is a misleading use of the word, and cannot avail them. But their Lordships think that they have not so used it. The mention of guarantees in the 16th bye-law is one of the passages in that article which have led their Lordships to the conclusion that the association contemplate the administration of assets in specie, and apart from their own property. When the association have given a guarantee, it will be time enough for them to claim a commission; possibly none may ever be given.

It has been pointed out that the Plaintiff represents only one of seven shares, and that only as regards his life interest. But if the corpus of the estate has been dealt with in a manner which cannot be justified in law, it is competent for any one interested to insist on the right principle being applied. In the recent case of *Beningfield* v. *Baxter* (1) this Committee held that they were bound to declare that a sale by an executor to himself was void, at the suit of one person among many interested, and a person whose interest in the property might possibly, and even probably, be reduced to nothing by the intervention of prior claims. The decision now pronounced does not prejudge the way in which it may hereafter appear desirable to administer the estate on proper consideration and with due regard to legal methods.

(1) Ante, p. 167.

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Their Lordships think it is proper—

(*a.*) To declare that, under the circumstances appearing in this case, transfers made to the association of securities belonging to the testator's estate, in consideration only of the association taking upon itself the obligation of paying to the testator's estate the sums secured thereby, do not confer upon the association any right of treating such securities or the money thereby secured as their own property.

(*b.*) To declare that the association are bound to administer such securities and money for the benefit of the testator's estate, and to pay to the plaintiff in respect of the income thereof such sums as, upon a due statement of account between him and the association, are found to be coming to him.

(*c.*) To declare that the association, not having guaranteed any portion of the fidei-commissary inheritances, are not entitled to any guarantee commission.

(*d.*) To dismiss the cross appeal.

(*e.*) In other respects to affirm the order of 13th July, 1885, now appealed from.

(*f.*) To direct the accounts to be taken and reformed with reference to the declarations hereby made.

It will be observed that their Lordships decide nothing as to the costs of the cessions, because, for the reasons before stated, they cannot tell whether it may not have been proper to make cessions of all the securities to the association, though they could not thereby become the absolute owners of the property transferred. Neither have they decided what the association are entitled to charge for their administration of the assets on the new footing which is assigned to them. They conceive that those matters will best be dealt with by the Supreme Court in taking the further accounts. They will humbly advise Her Majesty in accordance with the foregoing opinion, and the association must pay the costs of the appeals.

Solicitors for the Heirs Hiddingh: *Burchell & Co.*

Solicitors for Executors of Hiddingh: *Venning, Sons, & Manning.*

[PRIVY COUNCIL.]

FARNELL . . . . . DEFENDANT;

AND

BOWMAN . . . . . PLAINTIFF.

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1887
June 23;
July 23.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—39 Vict. No. 38—Liability of the Government to be sued in Tort.

Under New South Wales Act 39 Vict. No. 38, the Government of the Colony is liable to be sued in an action of tort.

Hettihewage Siman Appu v. *The Queen's Advocate* (9 App. Cas. 571) relates exclusively to the law of Ceylon, and does not lay down as a universal principle that actions ex delicto cannot be brought against the Crown.

APPEAL from a judgment (Jan. 7, 1886), overruling the appellant's demurrer to a declaration in an action of tort.

The appellant was secretary for lands of the Colony, and had been duly appointed under 39 Vict. No. 38, to be sued as nominal defendant on behalf of the Government in the action. The question was whether the Government was liable to be sued in an action of tort.

The Court (*Faucett* and *Windeyer*, JJ., *Martin*, C.J., dissenting) overruled the demurrer. The judges were unanimous in holding that the Crown is not, by the common law, or under any imperial statute, liable to be sued for damages ex delicto, and that all actions against the Government of the said Colony are actions against the Crown.

The Chief Justice held that the Act 39 Vict. No. 38, did not create any fresh right of action against the Government; the other judges, on the contrary, following previous decisions or opinions expressed in the cases of *Wakeley* v. *Lackey* (1), and *Municipality of Numba* v. *Lackey* (2), held that by virtue of the

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

(1) 1 N. S. W. R. 299.

(2) 1 N. S. W. R. 299.

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said statute the Government was liable to be sued in actions for damages ex delicto, as well as in actions for damages ex contractu.

Sir *Horace Davey*, Q.C., and *B. J. Leverson*, for the appellant, contended that the judgment of the Chief Justice was right, and that so far as the cases cited were decided on the ground that the Act created a fresh right of action against the Government, they were wrongly decided. The action was in effect against the Queen, and the Crown is not liable to be sued for damages ex delicto. So far from giving a fresh right of action, all that 39 Vict. No. 38, has done is to substitute a more effective procedure for enforcing against the Government rights of action already existing. Reference was made to *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2); *Thomas* v. *The Queen* (3); *Windsor and Annapolis Railway Company* v. *The Queen and The Western Counties Railway Company* (4). In order to create a new right of action against the Crown, the intention of the Act must be clear: an extended liability must have been created by express words or necessary implication: *The River Wear Commissioners* v. *Adamson* (5); *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (6); *Hettihewage Siman Appu* v. *The Queen's Advocate* (7); *Palmer* v. *Hutchinson* (8); *The Queen* v. *Williams* (9); *Nipper* v. *Watson* (10).

Rigby, Q.C., and *W. P. Beale*, for the respondent, admitted that if this case were to be decided according to English law it would be impossible to argue it, for a petition of right would not lie under the circumstances. But when once a petition of right is converted into an action against some one or other, the whole law on the subject is changed, and all the considerations depending upon the dignity and importance of the Crown are swept away. The question is exclusively one of the construction of 39 Vict. No. 38. By that Act a remedy is given against the

(1) 16 C. B. (N.S.) 355.
(2) 6 B. & S. 293.
(3) Law Rep. 10 Q. B. 31.
(4) 11 App. Cas. 607.
(5) 2 App. Cas. 743.
(6) 7 App. Cas. 178.
(7) 9 App. Cas. 571, 586.
(8) 6 App. Cas. 619.
(9) 9 App. Cas. 418.
(10) 3 N. S. W. R. 168.

Government for any claim or demand whatever—including the claim in this action. Reference was made to the earlier Acts, 20 Vict. No. 15, and 24 Vict. No. 27.

Leverson replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment or order of the Supreme Court of New South Wales in an action by the respondent, as plaintiff, against the Honourable James Squire Farnell, the present Appellant, who was then secretary for lands of the Colony, and had been duly appointed under the Act 39 Vict. No. 38, of the legislature of New South Wales, to be sued as the nominal defendant on behalf of the Government of the Colony.

The declaration contained two counts. The former charged that the Government by their servant broke and entered the lands of the plaintiff situate in the Colony, and lit fires thereon, and thereby burned down and destroyed the grass, trees, and fences of the plaintiff on the said lands. The second alleged that the Government by their servants so negligently and wrongfully lighted and maintained certain fires on the plaintiff's said lands in the first count mentioned, and upon lands adjoining thereto, and conducted themselves so negligently and wrongfully in and about the care of the said fires, and the taking of precautions against the spreading of the same, that by reason thereof the said fires spread over the lands of the plaintiff, and burned down and destroyed large quantities of grass and fencing thereon. The count also charged special damage.

The defendant pleaded not guilty, and also demurred upon the ground that the declaration was bad in substance, and stated as grounds for demurrer, first, that the Government were not liable to be sued in an action of tort; and two other grounds which, if tenable, have not been relied on in this appeal.

The main question to be determined is whether, under the provisions of the Act 39 Vict. No. 38, of the colonial legislature, the Government of the Colony is liable to be sued in an action of tort.

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The majority of the judges held that such an action would lie, the learned Chief Justice dissenting. The demurrer was therefore overruled, and it was ordered that judgment be entered for the plaintiff on the defendant's demurrer. From that order the present appeal has been preferred.

Their Lordships are of opinion that the order is right, and ought to be affirmed.

At the time of the passing of the 39 Vict. No. 38, two Acts of the colonial legislature were in force, viz., the 20 Vict. No. 15, and the 24 Vict. No. 27. The former of those two Acts was intituled "An Act to give relief to persons having claims against the Government of New South Wales;" the other, "An Act for the amendment of the law as to claims against the Crown." The latter Act recited that it was expedient to adopt the law of England relating to petitions of right, and to adapt the same as nearly as might be to the circumstances of the Colony, and the Act was passed in conformity with the recital. By the 7th section it was provided that nothing in the Act should give to the subject any remedy against the Crown in any case in which he would not have a remedy before the passing of the Act.

That Act was repealed by the 39 Vict., No. 38, and has never been renewed, probably because it was considered that the repealing Act afforded a better and more expeditious remedy for every case in which a petition of right would lie.

The 20 Vict., No. 15, was also repealed by the 39 Vict., No. 38, but as the latter Act contained provisions in pari materiâ, though giving more extensive remedies to persons having claims against the Colonial Government, it will be well to refer to the provisions of the repealed Act. The preamble was in the words following:—

"Whereas disputes and differences have arisen, and may hereafter arise, between the subjects of Her Majesty the Queen and Her Majesty's local Government in the Colony of New South Wales, the subject matter of which disputes and differences has arisen, or may arise, within the Colony; and whereas the ordinary remedy by petition of right is of limited operation, and is insufficient to meet all such cases, and is attended with great expense, inconvenience, and delay. Be it therefore enacted," &c.

It was then enacted, amongst other things, that—

"In all cases of dispute or difference touching any claim between any subject of Her Majesty and the Colonial Government of the Colony of New South Wales which may have arisen, or may hereafter arise, within the said Colony, it shall and may be lawful for any person or persons having such disputes or differences to present a petition to the governor of the said Colony, setting forth the particulars of the claim of such petitioner, which petition shall, within fourteen days from the presentation thereof, be referred by the governor to his executive council; and if the said governor shall, with the advice of his executive council, think fit, the said petition shall be referred to the Supreme Court of the said Colony for trial by a jury, or otherwise as such Court shall, after such reference, direct."

The Act then provided safeguards for cases affecting the royal prerogative, for the appointment of some person to be a nominal defendant to the petition, and for answering the claim out of the consolidated revenue of the Colony.

Act 39 Vict., No. 38, contains no preamble or recital, but it extends the provisions of the 20 Vict., No. 15, in favour of the subject.

It is intituled "An Act to enforce claims against the Colonial Government, and to give costs in Crown suits," and after repealing by sect. 1 the 20 Vict., No. 15, and the 24 Vict., No. 27, it enacts by sects. 2, 3, 4, 5, 6, and 7, as follows:—

"2. Any person having or deeming himself to have any just claim or demand whatever against the Government of this Colony may set forth the same in a petition to the governor praying him to appoint a nominal defendant in the matter of such petition, and the governor, with the advice of the executive council, may, by notification in the *Gazette*, appoint any person resident in the Colony to be nominal defendant accordingly. Provided that if within one month after presentation of such petition no such notification be made the colonial treasurer for the time being shall be the nominal defendant.

"3. The petitioner may sue such nominal defendant at law or in equity in any competent Court, and every such case shall be

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commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow, or may be awarded on either side, as in an ordinary case between subject and subject.

"4. The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant.

"5. In any action or suit under this Act all necessary judgments, decrees, and orders may be given and made, and shall include every species of relief, whether by way of specific performance or restitution of rights for recovery of lands or chattels, or payment of money or damages.

"6. In any action or suit by the Crown or Attorney-General on behalf of the Crown costs shall follow or may be awarded as in an ordinary case between subject and subject.

"7. The colonial treasurer shall pay all damages and costs adjudged against any such nominal defendant, or costs awarded against the Crown or Attorney-General under this Act, out of any moneys in his hands then legally applicable thereto, and forming part of or belonging to the consolidated revenue of this Colony, or thereafter voted by Parliament for that purpose, and in the event of such payment not being paid within sixty days after demand execution may be had for the amount, and the same may be levied upon any property vested in the Government of this Colony, but not upon any property real or personal vested in it on behalf of the Imperial Government, or to which such last-mentioned Government has any claim, or is in anywise entitled."

Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government. These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants. Under the present Act, if the governor with the advice of his executive council does not within a certified specified time appoint a nominal defendant, the colonial treasurer for the time being is, by the enactment of the legislature, to be the nominal defendant, and in an action

against the nominal defendant the rights of the parties are to be the same as in an ordinary case between subject and subject, and in the event of the damages and costs, if any, adjudged against the nominal defendant not being satisfied within a certain period, the 7th section enacts that execution may be had for the amount in the manner therein provided.

It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that "the king can do no wrong" were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England.

It appears from the recital in Act 20 Vict., No. 15, that one of the reasons which induced the legislature to pass that Act was that the ordinary remedy by petition of right was of limited operation, and insufficient to meet all cases of disputes and differences which had arisen or might arise between the subjects of Her Majesty the Queen and Her Majesty's local Government in the Colony. It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them.

Their Lordships further observe that, in the Act of 24 Vict., which was directed to amend the procedure on petitions of right, there was a proviso that it should not give to the subject any new remedy. But in the Act of 20 Vict., where one of the

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motives of the Act was that the existing remedy is limited and insufficient, there was no such proviso. So also in the Act of 39 Vict., which repeals that of the 24th, there is no repetition of the repealed proviso. The makers of these laws seem to have kept well before their eyes the two distinct processes, that of opening a larger range of remedies to the subject, and that of amending procedure without any enlargement of remedy. Their Lordships therefore cannot see why in construing the Act now under consideration, a Court of Law should go out of its way to strain the words, and to give them a meaning other than their ordinary literal meaning. If they did so, they would be introducing a certain amount of repugnancy into the Act itself: for the 5th section gives to the subject a right to have specific performance of contracts, which is not a kind of relief available against the Crown. The 3rd section expressly says that, in every case, not the proceedings only but the rights, shall be the same, and that judgment shall follow as in an ordinary case between subject and subject. Those enactments are not consistent with holding, as the learned Chief Justice expresses it, that the words "any just claim or demand whatever" can mean no more than such claims or demands as the law then recognised, and that they cannot include a claim for damages ex delicto.

Their Lordships wish to remark that in the course of the judgment in which the learned Chief Justice dissented from his colleagues, he expressed some broad views relating to the prerogative of the Crown, which have not been discussed at the bar on this appeal, and in which their Lordships must not be understood as concurring.

Reference was also made by the learned judges below to some observations which were made in the Ceylon case of *Appu* v. *The Queen's Advocate* (1), as if they were intended to lay down a universal principle that actions ex delicto cannot be brought against the Crown. But their Lordships were speaking solely with reference to the law of Ceylon, as to which every one was agreed that there existed no practice of suing the Crown on torts, whereas there did exist a practice of suing on contracts. It was argued that certain words in an Ordinance were to be

(1) 9 App. Cas. 571.

excluded from application to any kind of suit by a subject against the Crown, because they were capable of application to actions on torts, which did not exist. It was in answering that argument that their Lordships' observations were made, and it has no bearing whatever on the present controversy. Their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Want & Harston.*
Solicitor for respondent: *G. P. Slade.*

[HOUSE OF LORDS.]

H. L. (E.) 1887 July 5.

THE RIGHT HON. G. A. F. CAVENDISH BENTINCK, M.P. . . . . } APPELLANT;

AND

THOMAS FENN . . . . . RESPONDENT.

Principal and Agent—Agent for Purchase—Sale of Agent's own Property to Principal—Non-disclosure of Interest—Company—Director—Misfeasance or Breach of Trust—Contributory—Companies Act 1862 (25 & 26 *Vict. c.* 89) *s.* 165.

A director of a company as the company's agent purchased for the company a property in which, before he became director, he had acquired an interest. The company having gone into liquidation a shareholder whose shares were fully paid up took out a summons as a contributory, under sect. 165 of the Companies Act 1862, and sought to make the director liable for misfeasance or breach of trust on the ground that the director had allowed the company to make the purchase without disclosing his own interest, and at a price far exceeding the value:—

Held, that the application must be dismissed, the evidence adduced by the applicant failing to shew either that the director had not disclosed his interest or that the purchase price was above the value.

The decision of Pearson J. (*In re Cape Breton Company*, 26 Ch. D. 221) and of the Court of Appeal (29 Ch. D. 795) affirmed on the ground above stated.

Semble that such a contributory cannot take out a summons under sect. 165 unless he shews that the breach of duty has resulted in loss to the assets of the company and that he has a direct pecuniary interest in the success of the application.

APPEAL from a decision of the Court of Appeal (1).

The question arose upon a summons under sect. 165 of the Companies Act 1862, taken out by the appellant in the winding-up of the Cape Breton Company, alleging a misfeasance or breach of trust in the respondent as director of the company. The appellant was a holder of fully paid-up shares in the company. The terms of the summons and the evidence adduced by the appellant at the hearing of the summons are stated in the report of the decision before Pearson J., who dismissed the summons for the reasons appearing in that report (2). That decision was

(1) 29 Ch. D. 795. (2) 26 Ch. D. 221.

affirmed by the Court of Appeal (Cotton and Fry L.JJ., Bowen L.J. dissenting (1)). As will be seen from the judgments the decision of this House proceeded, not on the ratio decidendi of Pearson J. or of the Court of Appeal, but on the ground of the insufficiency of the evidence. The facts material to this report are fully stated in the judgments of Lord Herschell and Lord Macnaghten.

May 17, June 28, July 5. *Montague Cookson* Q.C. and *J. G. Butcher* for the appellant:—

The respondent, as director of the Cape Breton Company, committed a breach of trust and a misfeasance under sect. 165 of the Companies Act 1862 in not disclosing to his co-directors that he was part owner of the coal areas at the time of the purchase by the company. Further, the price paid was excessive. Of this there is sufficient evidence in the fact that the coal areas were originally bought by the respondent for much less, and were finally sold by the company at a heavy loss. The evidence is at all events enough to call upon the respondent to shew that the company gave no more than the real value. The Court of Appeal decided in favour of the respondent on the ground that the company by their own act had made rescission impossible, and that no other redress could be given. But in the first place when the company resolved to sell the property and so made rescission impossible the facts were not fully known. Secondly, though restitution of the property be impossible, compensation can be made in money either in an action or under sect. 165. If it be not so and if the decision below be upheld the door is opened to extensive frauds.

The mere non-disclosure of the respondent's interest was a fraud; and the making of a secret profit renders him liable to account under sect. 165: *In re British Seamless Paper Box Company*, per Brett L.J. (2). If an agent takes advantage of his principal for his own benefit a Court of Equity will set aside the transaction: *Rothschild* v. *Brookman* (3); and this after a lapse of years and without entering into the question of the fairness

(1) 29 Ch. D. 795. (2) 17 Ch. D. 467, 477.
(3) 2 Dow. & C. 189, 197.

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of the price: *Gillett* v. *Peppercorne* (1); and see *Robinson* v. *Mollett* (2); *McPherson* v. *Watt* (3); *Massey* v. *Davies* (4); *Burton* v. *Wookey* (5); *Hichens* v. *Congreve* (6); *Bentley* v. *Craven* (7); and *Benson* v. *Heathorn* (8). The principle contended for by the appellant is fully recognised in *Erlanger* v. *New Sombrero Phosphate Company* (9). Where a sale is induced by fraud, or where an agent sells his own property to his principal without disclosing his interest, the purchaser has an option to rescind the contract, or to retain the property and sue for damages: *Houldsworth* v. *City of Glasgow Bank*, per Earl Cairns (10). The respondent is liable to account either for the difference between the price at which he bought and the price at which he sold to the company, or for the difference between the price at which the company bought and the real market value, or at all events for any secret profit he has made in the transaction: *In re Ambrose Lake Tin and Copper Mining Company* (11); *Lord Hardwicke* v. *Vernon* (12). What the amount of profit is, is matter for inquiry; and the inquiry ought not to have been refused. Sect. 165, even if it does not give new rights, gives new remedies. The fact that the company adopted the purchase and cannot now rescind is no bar to the appellant, who is not bound by what the company did.

[They also referred on the question of the Statute of Limitations and laches to *Lindsay Petroleum Company* v. *Hurd* (13); *Flitcroft's Case* (14); *In re Alexandra Palace Company* (15).]

Sir *H. Davey* Q.C. and *Farwell* for the respondent:—

The decision of the Court of Appeal though right in law was erroneous in assuming as facts that the respondent failed to disclose his interest to the company at the time of the purchase, and that the property was sold above its value. In truth there is no evidence whatever to support either assumption. Such evidence

(1) 3 Beav. 78, 83.
(2) Law Rep. 7 H. L. 802.
(3) 3 App. Cas. 254, 272.
(4) 2 Ves. Jun. 317.
(5) 6 Madd. 367.
(6) 1 Russ. & My. 150.
(7) 18 Beav. 75.
(8) 1 Y. & C. C. C. 326.
(9) 3 App. Cas. 1218.
(10) 5 App. Cas. 317, 323.
(11) 14 Ch. D. 590, 594, 598.
(12) 4 Ves. 411.
(13) Law Rep. 5 P. C. 221.
(14) 21 Ch. D. 519.
(15) 21 Ch. D. 149.

as there is points the other way. And till the present argument no attempt was made to charge the respondent with fraud.

But even assuming the appellant's view of the facts he has made out no ground for relief. Rescission being out of the question, the only possible relief is in damages; and there is no case in which equity has given relief in damages against an agent selling his own property to his principal where the agent had not a fiduciary position at the time when he acquired the property for himself. The respondent was not a director or in any fiduciary position towards the company when he acquired his interest in the coal areas, and this is the cardinal distinction between the present case and the decisions relied on by the appellant which have any bearing on the point. The present case is one of the class in which the purchaser has an option to rescind; if he elects not to rescind equity can give no alternative relief. The decision of Malins V.C. and the observations of Lord Cairns in the House of Lords in *Erlanger* v. *New Sombrero Company* (1), are strong authorities against the claim for alternative relief. No doubt an action for deceit exists, but the plaintiff must prove that the contract was induced by fraud and that the purchaser was damnified. Here there is no evidence of either. No action will lie for mere non-disclosure: there must be an affirmative misrepresentation.

Sect. 165 gives no new rights or causes of action, but merely gives a summary remedy where an action lies; and this section cannot be put in force where the company has suffered no loss: *Coventry's Case* (2). Further, the appellant cannot put in force sect. 165; being only a holder of fully paid-up shares he cannot derive any benefit from the success of the application.

Butcher, in reply:—

It is the duty of an agent upon a transaction like this to disclose all material facts that he knows. Where a breach of duty has been committed damage will be inferred, and an action lies though no actual damage is suffered: *Marzetti* v. *Williams* (3); *Barker* v. *Green* (4). Money and shares belonging to the com-

(1) 5 Ch. D. 73; 3 App. Cas. 1218, 1235.
(2) 14 Ch. D. 660.
(3) 1 B. & Ad. 415.
(4) 2 Bing. 317.

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pany having come into the respondent's hands he must account for them.

The appellant is clearly "a contributory" within the meaning of sect. 165, and he has a direct interest in the success of the application, for if the assets of the company are increased he may recover the value of his shares. As to the position of a liquidator under sect. 165, see *In re National Funds Assurance Company* (1).

LORD HERSCHELL:—

My Lords, this case arises upon an application made in the winding-up of the Cape Breton Coal Company under the 165th section of the Companies Act 1862, the appellant claiming under that section that the respondent, who was a director of that company, should be held liable for misfeasance or breach of trust, he having been an agent of the company.

The evidence before your Lordships is very meagre; and in the arguments of the learned counsel which have been addressed to your Lordships a great many suggestions have been made which receive but little support from the evidence which has been adduced.

It appears that in the year 1871 certain persons associated themselves together under the name of "The Coal Area Association," and acquired three areas of coal known as the Haven, Lake and Balmoral areas. There has been some controversy as to the price at which they acquired those areas in the year 1871, but I think we may take it that the price was £5500. Amongst the persons thus associated under that title was the present respondent, Mr. Fenn. There were also his partner Mr. Crosthwaite, an engineer named Baker, and a Mr. Gisborne.

At the commencement of the year 1872 the persons who were thus associated as the Coal Area Association formed a limited company bearing the same name with the addition of the word "Limited"; and Mr. Gisborne, who resided in Nova Scotia, and by whom apparently these areas had been originally owned, or, at all events, in whose name they stood, assigned his interest in the coal areas to the Coal Area Association Limited, giving

(1) 10 Ch. D. 118.

them the right to use his name for all purposes for which it was necessary, in order to give them the full benefit of that assignment.

In the following year, 1873, negotiations were entered into for the amalgamation of certain other coal companies—three in number—the Lorway Coal Company, the Glasgow and Cape Breton Coal Company, and the Schooner Pond Coal Company, and an agreement was entered into for the purpose of the amalgamation of those three companies, and the transfer of their properties to a new company which was afterwards to be incorporated. The new company was to undertake all the liabilities, debenture and otherwise, of those three companies, and was to acquire all their property. This amalgamation arrangement was made the subject of an agreement of the 24th of October 1873; the agreement was made between the three companies that I have named and a Mr. Blunt on behalf of the intended new company, and by that agreement not only were these properties of the three existing companies to be acquired by the new company, but it was made a condition of the entire arrangement that the new company should also acquire by agreement of sale and purchase the three coal areas—the Haven, the Lake, and the Balmoral—which were the property of the Coal Area Association Limited, to which I have already called attention, at a price not exceeding £42,000, and on the terms that the vendors should take not less than two-thirds of the money in paid-up shares of the new company. The arrangement contemplated by that agreement was afterwards carried into effect: the new company was formed and incorporated in November of the same year, namely, the Cape Breton Coal Company Limited, and of that new company Mr. Fenn, the present respondent, and Mr. Baker, became directors. In the following month, the month of December, the purchase of these three coal areas which was contemplated by the agreement of October 1873 was carried into effect. The price given was the maximum price permitted by the agreement, namely £42,000, but instead of a third of it being in cash and the remainder in shares, £12,000 only was paid in cash and the difference, the remaining £30,000, was paid by shares of the new company.

At the time when that agreement was come to by the directors

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of the new company and the owners of those three areas Mr. Fenn and Mr. Baker were present; they were parties to the agreement and parties to putting the seal of the company to the agreement. It is in respect of that transaction that the present claim is advanced under the 165th section of the Companies Act of 1862. The question which your Lordships have to consider is whether there was a misfeasance in relation to that transaction within the meaning of the 165th section of the Companies Act.

Now, there can be no doubt that inasmuch as Mr. Fenn was interested with his partner Mr. Crosthwaite to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in the Coal Area Association Limited, he was bound to disclose that interest to the other directors of the new company who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. I think about that there can be no manner of doubt. But at the present time rescission has become impossible. Of course, that is not the remedy sought under the 165th section, but it is said on the part of the appellant, "Although rescission has become impossible, and that remedy is no longer available, I am nevertheless entitled to claim against the respondent that he shall make good to the company the loss they have sustained owing to his misfeasance in failing to make that disclosure."

The case has been put on behalf of the appellant in various ways. First it is said to be a case of a secret profit made by an agent, which profit he is therefore bound to hand over to his principal. Of course it cannot be doubted that Mr. Fenn as a director of the company was in the position of an agent, and undoubtedly if he filled any fiduciary position towards them at the time when he purchased this property he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company. But here it is beyond question that at the time when the purchase was made Mr. Fenn and his co-adventurers were none of them in any sort of fiduciary relation to the company, the existence of which was at that time not even contemplated.

Again, there probably is little doubt that if an agent of a

company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of a specific property, it was that specific property alone which the agent, the director, was authorized to purchase; it was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description, but his agency, so far as it existed at all, was an agency to purchase this specific property in which it is proved he had an interest.

Now, I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to shew that the price at which the property was sold to the company was in excess of what has been called the real price or the true value. Now what evidence is there here, upon which your Lordships would be entitled to act, that the property in question when purchased by the company was sold to them at a price in excess of the real value, or the market value, or the true value, in whichever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely a secret profit improperly made, that he should prove that there has been that excess which he alleges.

Now what are the only facts before us? The appellant relies upon the fact that this property purchased in 1871 at £5500

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was sold in the autumn of 1873 at the price of £12,000 in cash with an addition of £30,000 in shares in this new company. No doubt that is a fact of importance pointing in a particular direction. But it is not the only fact, and it is impossible for us to shut our eyes to information which is matter of common knowledge that in 1871 and subsequently to 1871 coal properties did rise very considerably in value—whether to this extent it matters not—that fact at all events prevents our coming to the conclusion that the price given in the early part of 1871 is any real guide to the value of the same property in 1873.

But that is not all, because in October 1873 an agreement was entered into between the representatives of three companies as well as a person acting on behalf of the intended new company. The representatives of three companies—the Glasgow, the Schooner Pond, and the Lorway—considered it worth their while to give up to £42,000, £14,000 of that sum to be in cash, for the purchase of this very property. These three companies were entirely independent, as far as appears, of the persons who owned the coal areas in question. All that is said with regard to it is, that these three companies had originally been promoted by the same persons. But it is impossible to shut one's eyes to the fact that such an agreement was come to as affording evidence that this was considered in October 1873 as the value of the property.

It is not necessary to inquire what the real value of the property exactly was, or for your Lordships to come to any determination upon it. As I have said, you may have reason to suspect that the price given was excessive, but how is it possible, in the face of the evidence to which I have called attention, for your Lordships to come to the conclusion that any such case is established as is alleged on behalf of the appellant, namely, that a sum in excess of the real value was in December 1873 agreed to be given by the directors of the Cape Breton Coal Company for these three coal areas? I think it is impossible to arrive at any such conclusion, and to say that, therefore, there has been misfeasance on the part of Mr. Fenn, the present respondent, which would warrant your Lordships coming to the conclusion that he should be compelled to return a part of the money

received in respect of this purchase on the ground that he was making improperly a considerable profit.

But I own that I entertain very great doubt in the present case whether there is any evidence establishing that which it is essential to establish for the purpose of making out the appellant's case. I mean that there was a misfeasance on the part of the respondent in concealing his interest in the property. No doubt where rescission is claimed, if it is shewn that a person taking part in the transaction of purchase was himself one of the vendors, the onus would be on him of shewing that he made full disclosure. But when an applicant seeks under the 165th section to establish a case of misfeasance I think it is necessary for him to give evidence of all the elements that go to make up that misfeasance. There is no misfeasance in a person who has an interest in the property, by being a shareholder in the company which is selling it, nevertheless acting as a director in the purchase of that property for another company. The misfeasance, if it exists at all, must be in this, that he enters into such a transaction without communicating to his co-directors the fact that he has such an interest. It seems to me that it must rest with those who allege the misfeasance to prove that element, which is an essential element to make out misfeasance at all.

Now, what is the evidence here? I cannot see the slightest evidence, upon the affidavit of Mr. Harper or otherwise, to shew that disclosure was not made in the present case, or that the other directors were not perfectly well aware of Mr. Fenn's position. One may speculate about it, one may imagine that they were not; but, as I have said, those who undertake to make out a case of misfeasance must establish that case before they can claim the relief to which it is suggested they are entitled.

Then it is said that the case may be put in another way, that there was here at all events a breach of duty, and that in respect of that breach of duty a claim may be made under the 165th section, the breach of duty being the omission to make full disclosure. There, again, I have only to repeat that I fail to see the evidence that there was any such breach of duty committed. And I think that in order to establish a claim to relief it would be necessary not only to shew a breach of duty but to shew a

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breach of duty which resulted in pecuniary loss to the company. It may be perfectly true that where there is a duty, whether arising out of a contract or otherwise, by one person to another an action will lie in respect of a breach of that duty although no substantial damage has been suffered. In an action nominal damages may be recovered wherever a breach of duty is shewn. But I certainly do not think that any such doctrine can be applied to the 165th section. The right which the 165th section gives is not given to the company, or the representative of the company with whom there is a contract, or as towards whom there is a duty or as regards whom there is a breach of duty; but the right under the 165th section is given to "any liquidator or any creditor or contributory of the company." Now there is no duty or breach of duty to the company in respect of which a creditor or contributory can maintain an action, but he has a right to this extent, that if owing to a misfeasance or breach of duty the funds of the company in which he is interested have been diminished those funds shall again be made good and the assets of the company shall be recouped the loss which they have sustained. And, therefore, I think, that assuming that a breach of duty such as is suggested would be a misfeasance giving rise to an application under the 165th section such an application could only succeed where it could be shewn that the breach of duty had resulted in loss to the funds and assets of the company.

The only other way in which the case has been put is that there has been deceit or fraud which would give rise to this application. With reference to the last two claims to which I have alluded, namely the claim for breach of duty and the claim in respect of deceit or fraud, I think that it would be a very grave question whether it would be proper to give the relief applied for upon a summons such as we find in the present case. I think that where it is intended to allege such a breach of duty, and where it is intended to allege fraud or deceit, those allegations should be clearly, satisfactorily, unequivocally made in the summons, so that those against whom they are made should have their attention directed to them and should have an opportunity of meeting them. In the present case I entertain certainly a strong impression that it never was intended at the time when

the summons was issued to make any such allegations. In my opinion there was an idea that the defendant, Mr. Fenn, could be made responsible for the difference between what he gave for the property and the price at which he sold it, and the claim was in respect of his putting the seal to those two agreements, and it was supposed that that resulted in an obligation to pay the difference; because I do not find anywhere an allegation either that there was misfeasance in respect of a breach of duty to disclose or that there was misfeasance in respect of fraud or deceit in making a false representation to the company or to his co-directors.

I own that I see no ground whatsoever for alleging fraud. The allegation is based solely upon this; it is said that the respondent represented to the directors that the property belonged to Mr. Gisborne and did not belong to him, and that allegation rests entirely upon the statement in the affidavit of Mr. Harper that "Frederick Newton Gisborne was in each case put forward as the sole vendor of the property." Now Mr. Harper only purports to found his affidavit upon the information which he has obtained from a perusal of the documents in the case, and the sense in which he says that "Frederick Newton Gisborne was put forward as the sole vendor" must be gathered from the documents upon which he founds that statement. Those documents no doubt shew that contracts were entered into in the name of Gisborne. Gisborne at that time was the legal owner of the property, and in those contracts Gisborne who was the legal owner of the property comes under an obligation to obtain a lease and certain rights in the name of the new company. That perhaps accounts for the fact that the agreements were entered into in the form in which they were with Gisborne; but whether this is so or not, to say that the mere fact that the agreements were entered into in that form with the trustee, who was the legal owner, without any mention of the beneficiaries, is sufficient to prove a fraudulent misrepresentation that he and he alone was the owner, seems to me, I own, a somewhat extravagant proposition. At all events I feel quite sure that your Lordships would not be justified in holding so serious a charge as that of fraud to be established upon evidence of such a very flimsy description.

I think I have now dealt with the whole of the case put for-

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ward on behalf of the appellant, and I have come to the conclusion that he has not established, on any of the grounds suggested, that there has been misfeasance on the part of the respondent resulting in loss to the company in respect of which compensation can be claimed.

There are only two other points to which I need call attention. One of them is the question how far it would be open to the present appellant to bring forward the case upon which he now insists, having regard to the scheme of arrangement which was before the creditors and shareholders of the new company and the action which was taken by the liquidator in selling the property of the company. I am not myself disposed to attribute, in the present case, so much force as was attributed by the learned judges in the Court below to the transaction in question as excluding the appellant from the right upon which he now insists. If the appellant could have established that although rescission was not open to him he had a substituted cause of action in respect of deceit or fraud or breach of duty for which an action could have been maintained consistently with the property remaining in the company, I should not myself be prepared to say that that right would be got rid of or could not be insisted upon in the winding-up under sect. 165, by reason of the transaction to which I have alluded in respect of the property; but of course, in the view which I take it is not necessary to pronounce any further opinion upon that point.

One other point remains, namely the question whether the present appellant has a right, though having no interest, to invoke the assistance of the Court under sect. 165. Of course in the view which I take it is not necessary to pronounce an opinion upon that point, but the point having been raised and argued before your Lordships it may be expedient that it should not be passed over without some expression of opinion upon it. I confess myself that I cannot help entertaining the gravest doubt whether the appellant has really any locus standi. I think it clear that he is not a creditor. His only claim, therefore, to the assistance of the Court must be on the ground that he is a contributory. He is a contributory whose shares are fully paid-up. He would be interested, therefore, as a contributory if any

funds could be brought into the coffers of the company out of which it would be possible that any return could be made to him. But I cannot think that it was the intention of this section, or that it was contemplated by the legislature, that a contributory who could have no possible interest in the result of the application and could obtain no benefit whatsoever as a contributory —even if to the fullest extent to which the claim was advanced it proved good—should have a right to apply under this section. True, "contributory" is mentioned without any sort of limitation, but so it is in sect. 82 of the Act, which allows a contributory to petition for winding-up, where it has been held that a shareholder with fully paid-up shares of the company, although a contributory within the words of the section is nevertheless, or may be nevertheless, not entitled to invoke the assistance of the Court if he be a person having no real interest in the company.

For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs, and the judgment of the Court of Appeal affirmed, and I so move your Lordships.

LORD WATSON:—

My Lords, I am of the same opinion as my noble and learned friend. I do not desire to rest my judgment upon the reasons which were assigned for the decision of the learned judges in the Court of Appeal. It is not, to my mind, clear that because it has become impossible to make restitutio in integrum to the seller, a claim under either of the two heads embraced in sect. 165 of the Companies Act of 1862 is necessarily excluded. I think it is material, in considering this case, to attend to the specific nature of the claims which are sanctioned by that section. It authorizes the recovery, at the instance of a liquidator, a creditor, or a contributory of the company in liquidation, first of moneys for which the defendant has become accountable to the company, and secondly of pecuniary loss sustained by the company through the misfeasance or breach of duty of the defendant. It does not include any claim against a seller to the company which could only be made good by the remedy of offering back the property and seeking restitution of the price.

I think the appellant, assuming that he had a legal right to

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enforce its provisions, was entitled to have an action against the respondent Mr. Fenn under the 165th section upon these two grounds. In the first place he might shew, as he has endeavoured to do, that Mr. Fenn by the transaction in question, has made a secret profit when acting as agent for the company, or he might shew that having originally concealed his true position he has by deliberate acts of his own prevented the knowledge of that position reaching the company until restitution had become impossible. The latter, I need hardly say, is a case of deliberate and intentional deceit, in other words it is fraud. But the basis upon which each of these claims rests is that the company have, through his conduct, whether in making a profit or in fraudulently acting, suffered pecuniary loss.

In a case where rescission is asked, and it is not denied that at the time when the sale was made the seller failed in breach of his duty to disclose his interest, the onus rests upon him to prove, if he desires to maintain the transaction, that his interest became known to the purchaser at a subsequent period, and that the purchaser either expressly or by plain implication elected to uphold the transaction. But the case is very different when a defendant is charged with making undue profits in the dark at the expense of the purchaser or with fraudulent concealment of facts, which has led to loss on the part of the purchaser. The onus probandi there is upon the plaintiff—the usual rule of law must apply. I know of no case where by implication of law the duty of clearing himself from an imputed fraud rests on the defendant.

I do not intend to enter into the facts of this case, which have been fully and satisfactorily criticised by the noble and learned Lord. I can only say that the proof seems to me to fail at the very outset. There is really no reliable evidence, upon which a Court can act, of pecuniary loss to the company, whatever may have been the conduct of the respondent Mr. Fenn. But I am bound to go further and to say this, that for the imputation of fraud, which is involved in the second of these grounds of action, I can find no foundation whatever in the evidence before us.

I have only to add that I concur in the concluding observations of my noble and learned friend. It appears to me that it

was not the intention of the legislature to give a right of suit under the 165th section of the Companies Act to any person who had not a pecuniary interest in the result. I think the inference of law is that the legislature always expects that there shall be an interest and intends to confine the right of action which it gives to those who are possessed of it. In this case the appellant is a contributory, not in the sense of being liable to pay money into the coffers of the company; he simply stands in the position of a possible recipient of a share in the balance of the assets after payment of the debts. There is no suggestion that any such fund will ever exist or that it would be called into existence by his success on this summons.

LORD FITZGERALD:—

My Lords, concurring as I do in the judgment proposed by the noble and learned Lord upon the woolsack and in the reasons of my noble and learned friend opposite, it will be sufficient for me to say that it appears clearly to me that the appellant here has not a particle of interest in the litigation which he has instituted, and could never possibly derive any benefit from it. That being his position in that respect I entirely concur with my noble and learned friend opposite.

The Court of Appeal as well as Pearson J. in the Court below dismissed the claim of the appellant upon the ground that the company had put itself in a position in which this contract could not be rescinded.

There is no doubt that Mr. Fenn, who had become a director of the Cape Breton Company, was guilty of a breach of duty if he did not disclose the fact that he himself had a large pecuniary interest in the purchase by the Cape Breton Company, at the stipulated price, of these three coal areas. But I am not by any means satisfied that that serious proposition has been made out. Moreover, there is not to my mind a shred of proof, as to what, at the time when that purchase was made, was the real value of these three coal areas. It is true that they had been purchased some years before at a much less sum; but have we any element of proof before us upon which we can come to the conclusion at the present moment that the true value, if means had been taken to

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ascertain the true value, of the coal areas was not equal to the price that was then put upon them? There is no such evidence, and the inference is the other way, for you have three independent companies converted into one by the amalgamation and agreeing by the amalgamation agreement to purchase these three coal areas at a sum not exceeding £42,000; and you have that same company afterwards, when formed into a new company, ratifying and adopting that agreement. The inference to my mind would be that the price was not an unreasonable one; but without drawing such an inference it is only necessary to say that we have no proof that the sum stipulated for exceeded a fair and reasonable price for the coal areas at that time.

For these reasons I concur in the judgment which has been announced.

LORD MACNAGHTEN:—

My Lords, I agree. When the case was first opened I was under the impression that the appellant had an interest in the result of the application apart from any question of costs, and I was also inclined to think that although the case was presented in a very fragmentary and unsatisfactory manner, and the evidence was meagre in the extreme, yet there was something which the respondent ought to be called upon to answer. But I am bound to say that after the very able argument of Sir Horace Davey, I am convinced that there is no ground for disturbing the order of the Court of Appeal.

The application which has given rise to this appeal is made under the 165th section of the Act of 1862. Mr. Cavendish Bentinck, describing himself as a creditor and contributory of the Cape Breton Company, charges Mr. Fenn with misfeasance or breach of trust. The acts complained of are the affixing the seal of the company to two agreements by which certain coal areas in which Mr. Fenn was interested were made over to the company, and the payment of the purchase-money for those coal areas. The relief asked for by the summons was payment to the official liquidator of the whole of the purchase-money, or at any rate of that portion of the purchase-money which went into Mr. Fenn's pocket. At your Lordships' bar and, as I understand

it, in the Courts below, it was suggested that at all events Mr. Fenn was liable for the difference, whatever it might be, between the price paid and some lesser sum which the appellant referred to as the real value of the property.

The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been judicially determined that the applicant is bound to shew that he is interested in the result of the application, but I think it must be so. I cannot think that Parliament intended that a person who happens to come under the description of a creditor or a contributory may take upon himself the functions of a public prosecutor in a matter with which he has really no concern. It was therefore, in my opinion, necessary for the appellant to prove that Mr. Fenn has committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton Company, and that by reason of that misfeasance the company has sustained loss; and it was also necessary for him to shew that he has an interest in the result of the application.

I am of opinion that the appellant has not succeeded in establishing any one of these propositions.

The facts of the case lie in the narrowest possible compass. There were three English companies carrying on business in Nova Scotia. Each of these companies was formed for the purpose of acquiring and working coal property there. So far as appears these three companies were independent bodies, and they had that amount of respectability which is supposed to be implied by the possession of a large paid-up capital and the existence of a large debenture debt. In 1873 these companies determined to amalgamate, and they considered that it was for their mutual benefit that the three coal areas mentioned in the summons,

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which belonged to a syndicate or association of which Mr. Fenn was the managing director, should be purchased, provided they could be acquired at a price not exceeding £42,000, of which one-third might be paid in cash and the balance in shares of the new company—that would make the cash payment £14,000. It was an essential condition of the proposed amalgamation that the three coal areas should be acquired by the new company.

It seems to me that there is nothing inconsistent with what appears upon the face of this amalgamation agreement in assuming that the managers of these three companies knew perfectly what interest Mr. Fenn had in the property, and that the price mentioned in the agreement was the result of communications with him. The Cape Breton Company was formed to carry out this scheme. There were to be five directors, of whom Mr. Fenn and Mr. Baker, who were interested in the three coal areas, were to be two. There were to be three other directors, who apparently had no interest in these three coal areas. It would seem that the price had been the subject of reconsideration in the interval between the date of the amalgamation agreement and the formation of the company, because the proposed mode of payment was somewhat altered. The articles of association provided for the issue of £30,000 in shares and limited the cash payment to £12,000.

On the 5th of December, 1873, an agreement was made for the sale of these three coal areas to the Cape Breton Company at the maximum price. On the 17th of December the seal of the company was affixed to that agreement. Mr. Fenn and Mr. Baker were both present on the occasion, but we are not told whether they took any part in making the agreement, nor are we told whether there was any negotiation whatever with regard to the price after the company was formed. For all that appears, Mr. Fenn may have disclosed his interest to his co-directors, and he may have stood aside and left them to complete the agreement.

I think it was the duty of the appellant to establish his case, and I point out to your Lordships that certainly there was sufficient time spent before the matter was brought into Court. Apparently all the documents in the possession of the company were produced to the applicant and he has had the opportunity, at any

rate, of examining both Mr. Fenn and the other three directors, who, it is suggested, were kept in ignorance of the real truth of the transaction.

If I were asked to speculate or to guess whether Mr. Fenn's interest was disclosed or not, I should certainly be inclined to say that in all probability it was disclosed; I cannot see what was to be gained by concealment. We start with the amalgamation agreement. That is not impeached. At the date when the purchase agreement was made the owners of the property were the masters of the situation. The Cape Breton Company had declared the price which they were prepared to give. If the property were not purchased, the whole amalgamation scheme would necessarily fall through, and everything that had been done up to that time would be thrown away. It appears to me, therefore, that there was no reason whatever for concealing Mr. Fenn's interest from the other three directors. Nor can the price be regarded as excessive. I think it must be taken that £5500 was paid for the property. The new company gave £12,000 in cash. I think we may leave out of consideration the portion of the purchase-money which was to be paid in shares, which represented the profit to be gained either from working the coalfield or from the credulity of the public. However that may be, it clearly appears to me that the appellant has not proved that there was any misfeasance, nor has he proved that there was any loss.

With regard to this part of the case, I merely desire to make one observation. I think it was the duty of Mr. Fenn to take care that his interest was disclosed to his co-directors, and I think that the omission of that duty would have been no light matter. I think that if a person in the position of Mr. Fenn abstained from disclosing his interest, and thus led the board to purchase the property for more than it was really worth, it would be very difficult for him to escape from the charge of fraud. I think it would have been a fraud to have concealed his interest and so to have represented, in fact, that he was not interested in the property, and that it belonged to other persons who were not connected with the scheme.

I will only add that it appears to me that the applicant has

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really no interest in the subject-matter of the application. I do not think that he is a creditor. As a contributory it is utterly impossible, upon the facts as stated by himself, that he could ever derive any benefit from this litigation. I therefore entirely concur in the motion which has been proposed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 5th July 1887.

Solicitors for appellant: *Harper & Battcock.*
Solicitors for respondent: *Dollman & Pritchard.*

[HOUSE OF LORDS.]

H. L. (E.) 1887 Aug. 8.

THE ATTORNEY-GENERAL . . . . . APPELLANT.

AND

THE MARQUIS OF AILESBURY AND OTHERS. RESPONDENTS.

Revenue—Probate Duty—Lunatic—Accumulation of Personal Estate—Investment of Personalty in Realty—Conversion.

Money of a lunatic was invested by his committees, by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands, which under their Lordships' direction, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators and assigns," with a declaration that the lands so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and re-investment which were contained in the deed) should "to all intents and purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered:—

Held, reversing the decision of the Court of Appeal (16 Q. B. D. 408) and restoring the decision of Mathew and Smith JJ. (14 Q. B. D. 895), that the value of the lands was part of the personal estate of the lunatic at his death and liable to probate duty.

APPEAL from a decision of the Court of Appeal (1) upon an information by the appellant, and an answer by the respondents.

The material facts of the information were as follows:—

The object of the information is to recover duty payable under the Customs and Inland Revenue Act 1881.

(1) 16 Q. B. D. 408.

By an inquisition dated the 17th of June 1858 under an order of the Lords Justices of Appeal, sitting in Lunacy, Sir Henry Meux was found to be of unsound mind, and committees of his estate were appointed. Sir H. Meux continued of unsound mind until his death, and his estate was managed and administered by the committees, acting under the orders of the Lords Justices sitting in Lunacy. Very large sums of money, part of the personal estate of Sir H. Meux, accumulated in Court to the credit of the lunatic's estate, and these sums, with the sanction of the Lords Justices, were expended from time to time by the committees of the lunatic in the purchase of land, the amount so expended exceeding one million pounds sterling.

All the purchases were directed to be carried out by orders in Lunacy especially applied for on each occasion. In the first and third purchases of land by the committees the conveyances were directed by the orders approving the purchases to be made, and were in fact made, to the use of the trustees, their heirs and assigns, upon trust to raise the amount of the purchase-money, and subject thereto upon trust for Sir H. Meux, his heirs and assigns. In all the purchases (excepting the first and third) the conveyances are to the use of the committees, their heirs and assigns, in trust for Sir H. Meux, his executors, administrators, and assigns, and there are declarations in each case that the premises granted are to all intents and purposes to be considered as part of the personal estate of Sir H. Meux. The conveyances were drawn in conformity with the terms of the several orders of the Court sanctioning the respective investments, the intention (as the informant submits) and the legal effect being that the nature and character of the property as part of the personal estate of Sir H. Meux should not be in any way altered by the fact of the investments being made, and that it should remain personal estate of the lunatic at his death.

The following statement shews the form of the conveyance made in 1866 of the Wootton Bassett estate in Wiltshire, and all the other conveyances (with the exception of the two above mentioned) were to the like purport and effect. The indenture recited an agreement for the purchase, subject to the approval of the Lord Chancellor, for the price of £225,000, exclusive of

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timber, of the manors, advowson, messuages, farms, land, tenements and hereditaments therein-after described; an order, and a certificate of one of the Masters in Lunacy, both made in the matter of the lunacy, appointing committees; an order made by Knight Bruce and Turner L.JJ. upon the petition of the committees that the Masters in Lunacy should settle and approve of a proper conveyance to the petitioners or some other proper parties, in trust for Sir H. Meux, his executors, administrators, and assigns, with a declaration that the estate was to be considered as part of the personal estate of Sir H. Meux, and with powers of sale, exchange, and leasing, with the provision that during the continuance of the unsoundness of mind of Sir H. Meux and until the proceedings in the matter should be superseded such powers were not to be exercised without the approval of the Lord Chancellor or the Lords Justices of Her Majesty's Court of Appeal entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of idiots and lunatics, and their estates; that the Masters in Lunacy had settled and approved of those presents as a proper conveyance to be executed in pursuance of the last-recited order, and an order that the agreement should be carried into effect on behalf of Sir H. Meux.

The indenture then witnessed that in pursuance and performance of the agreement and in consideration of the sums of £225,000, and £7357 9*s.* 10*d.* (being the price of timber), paid to the vendor out of a fund standing to the credit of the matter of Sir H. Meux, a person of unsound mind, and which fund formed part of the personal estate of Sir H. Meux, the vendor conveyed the manor, lands, and hereditaments thereinafter particularly mentioned, with the appurtenances, unto and to the use of the committees, their heirs and assigns, for ever, upon trust for Sir H. Meux, his executors, administrators, and assigns; and certain powers of leasing and sale were given to the trustees over the hereditaments. And it was thereby declared that the manors, advowsons, hereditaments, and premises thereinbefore expressed to be thereby granted, were to all intents and purposes to be considered as part of the personal estate of Sir H. Meux.

The indenture contained powers to the trustees to sell or exchange the lands and hereditaments for other lands and hereditaments, with a declaration that all moneys payable on such sale or exchange should be laid out in the purchase of other lands and hereditaments: all lands and hereditaments so bought or taken in exchange to be settled subject to the same powers, provisoes and declarations as those in this indenture contained.

Sir H. Meux, being still of unsound mind, died on the 1st of January 1883. By his will dated the 8th of August 1856, and a codicil dated the 3rd of July 1857, he had made certain dispositions of his real estate and also of his personal estate, and the will and codicil were duly proved by the defendants, the executors therein named. Pursuant to the Customs and Inland Revenue Act 1881 the defendants made an affidavit on applying for probate as to the amount of the personal estate of Sir Henry Meux, but in such affidavit they did not include the value of the before mentioned investments, except the first and third, which they did include.

The information prayed a declaration:—

That the value of the land and hereditaments, purchased as aforesaid, with funds forming part of the personal estate of Sir H. Meux, during his lunacy, by way of investment, was part of his personal estate and effects at his decease, and was liable, under the Customs and Inland Revenue Act 1881, to duty as part of the estate and effects in respect of which probate of his will was granted to the defendants, and for an account and inquiries.

The defendants in their answer denied that the conveyances were made as stated in the information to the committees as trustees for the personal estate of Sir H. Meux, and that the intention and legal effect of the conveyances were as stated in the information, and submitted that the property comprised in the conveyances was real estate of Sir H. Meux, and so remained at the time of his death, and that such property was not liable to duty under the Customs and Inland Revenue Act 1881.

They also submitted that they ought not to have paid duty in respect of the property comprised in the first and third conveyances, and insisted that the duty paid in respect thereof ought

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to be returned to them, and submitted that they ought not to be compelled to pay duty in respect of any of the property comprised in the conveyances.

The Queen's Bench Division (Mathew and A. L. Smith JJ.) declared that the value of the land and hereditaments in question was part of the personal estate of Sir H. Meux and was liable to probate duty (1). The Court of Appeal (Lord Esher M.R., Cotton and Bowen L.JJ.) reversed this decision (2).

The appeal was twice argued; first on the 24th, 25th, 28th and 29th of March by F. Vaughan Hawkins (Sir R. Webster A.G. and Sir E. Clarke S.G. with him) for the appellant, and by Montague Cookson Q.C. and Sir H. Davey Q.C. (R. V. Williams and Arthur F. Leach with them) for the respondents, before Lord Halsbury L.C. and Lords Watson, FitzGerald and Macnaghten; and secondly by one counsel of a side on the 26th and 28th of July before the same noble and learned Lords and the Earl of Selborne.

July 26, 28. *Vaughan Hawkins* for the Appellant:—

The question is not whether the property has been reconverted into money, but whether it has been converted into land.

[EARL OF SELBORNE:—What power has the Court to change the character of the property?]

It is submitted that it has none. Formerly it could not sell the real estate: *Ex parte Dikes* (3); but by the Lunacy Regulation Act 1853 ss. 116, 118, 119 a power is given to sell land &c. for certain specific purposes, e.g. payment of debts, and it is provided that the surplus purchase-money remaining after those purposes are satisfied "shall be of the same nature and character as the estate sold." It is said that the Court looks only to the interest of the lunatic, and where that interest demands it, will apply money in such a manner as necessarily to change the nature of the property. The dictum of Lord Cottenham in *Re Badcock* (4) is opposed to this view and has generally been taken as settling the law. But even in the interest of the lunatic it

(1) 14 Q. B. D. 895.
(2) 16 Q. B. D. 408.
(3) 8 Ves. 80.
(4) 4 My. & Cr. 440.

was desirable that the property should retain the character of personalty; because the Court's power of dealing with it would be restricted if it became realty.

The only argument against the Crown is that there is no direction to sell. The objection would have more weight if the property had been originally land, and the question were, whether it had been converted into personalty. Here there is not only the declaration but a conveyance in trust for the lunatic his executors administrators and assigns. Such a trust of realty is not merely nugatory; it is properly used in three cases; those of lunatics, Elmer on Lunacy 4th ed. p. 162; infants, Seton on Decrees 3rd ed. p. 692; partners, 9 Bythewood and Jarman on Conveyancing 3rd ed. p. 529–534. "Executors" is a term of limitation correlative with "heirs": Co. Litt. 54 b, Fearne's Contingent Remainders 77 seq. The declaration that the property is to be considered as personalty is sufficient without an express trust for sale; it is equivalent to a direction that the land shall be sold at some time or other. The observations of the editor of Jarman on Wills 4th ed. 586, have been referred to. But in *Attorney-General* v. *Mangles* (1) cited in support of those observations there were directions inconsistent with an intention to convert, and the editor himself says that the declaration would generally amount to an implied direction to sell, where a sale is not expressly excluded: *Tait* v. *Lathbury* (2); *Johnson* v. *Arnold* (3). Powers of leasing and management are not inconsistent with the declaration; they are the necessary accompaniments of the legal condition of the property though converted in equity: 3 Davidson on Conveyancing 2nd ed. pp. 3, 43, 44; and for the converse case of a settlement of money to be held as real estate, p. 1062 of the same volume. The suggestion that the executors would take the estate as personæ designatæ with a duty to apply it as part of the personal estate cannot be accepted. They may so take where a gift is made to them after their testator's death, not in any other case: *Webb* v. *Sadler* (4); *Perry's Executors* v. *Reginam* (5).

(1) 5 M. & W. 120.
(2) Law Rep. 1 Eq. 174.
(3) 1 Ves. Sen. 169.
(4) Law Rep. 8 Ch. 419.
(5) L. R. 4 Ex. 27.

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[LORD MACNAGHTEN referred to *Ex parte Grimstone* (1), cited in *Oxenden* v. *Lord Compton* (2) and *Leitrim* v. *Enery* (3).]

If the declaration is insufficient it is void altogether. It cannot be held to be good so far as to affect the devolution. The Court cannot make the lunatic's real estate descend as personalty. [*Ex parte Annandale* (4), *Webb* v. *Lord Shaftesbury* (5), *Attorney-General* v. *Hubbuck* (6) were also referred to.]

Montague Cookson Q.C. for the respondents:—

In *Ex parte Dawes* (7) Lord Esher M.R. gives the well-known rules for the construction of deeds. The conveyance alone must be looked at, not the order. If the conveyance did not properly carry out the order, it might be reformed. But this would only be done on the application of parties interested in the estate. The Crown would have no equity. If it be said that the conveyance has followed the words of the order, the answer is that the order was executory, and if the same words were insufficient to carry out the intention when used in a conveyance, different words should have been used. "Executors administrators and assigns" are not apt words of limitation as applied to realty, and when used in an executed trust are nugatory. In such a case equity follows the law: *Wright* v. *Pearson* (8). What the effect of the deed is it may be difficult to say. Probably the view taken by Cotton L.J. is correct, that the lunatic took a life estate with a resulting trust for himself in fee. For the converse case of a gift of personalty with words of limitation appropriate to realty, see *Evans* v. *Ball* (9). The declaration could not effect a conversion without a trust to sell. The opinion of the editor of Jarman on Wills, that the declaration implies such a trust, is not supported by the authorities cited. Besides here there are provisions inconsistent with that construction. The powers of leasing, and sale and repurchase, of land shew that the intention was that the property should be held as land. There is

(1) Amb. 706.
(2) 2 Ves. Junr. 69, 74.
(3) 6 Ir. Eq. Rep. 357.
(4) Amb. 80.
(5) Madd. & Geld. 100.
(6) 13 Q. B. D. 275.
(7) 17 Q. B. D. 275, 286.
(8) 1 Eden, 119.
(9) 47 L. T. (N.S.) 165, 167.

a difference between the case of a lunatic and that of an infant: *Ex parte Phillips* (1). In the former case the Court looks only to the interest of the lunatic and will change the character of the property where that interest requires. There is no liability to probate duty unless there was a trust for conversion which arose during the lunatic's lifetime: *Matson* v. *Swift* (2). To constitute such a trust there must have been some one who could call upon the trustees to sell. Here there was no one who could have enforced a sale. The lunatic might in a lucid interval have elected to take the estate as realty: *Attorney-General* v. *Brunning* (3). There is no equity between the executors and heir of a lunatic: *Oxenden* v. *Lord Compton* (4).

Vaughan Hawkins replied.

The House took time for consideration.

Aug. 8. LORD HALSBURY L.C.:—

My Lords, it is not my intention to dissent from the conclusion at which I understand the majority of your Lordships have arrived. If the matter were res integra, I think much might be said as to the effect of the original investment in land on behalf of the lunatic; the authority under which that investment was made; and the effect that should properly be given to the trust declared by the Lords Justices. But I yield to authority. I think the practice of the Court of Chancery for more than one hundred years, and the authority of Judges of very great eminence, establish such a course of practice and such a chain of authority that I do not think I am at liberty to assume that either the Court or those very learned Judges were in error as to their powers and jurisdiction. And I cannot deny that if the course so sanctioned by usage and authority is authorized by law, it governs this case.

I do not think it would be a profitable exercise to point out how, if this case were not governed by such authority, and one were more free to argue it on abstract principles, the decision

(1) 19 Ves. 118, 122.
(2) 8 Beav. 368, 376.
(3) 8 H. L. C. 243, 260.
(4) 2 Ves. 261, 263.

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ought to be the other way. I am therefore prepared to concur in the motion which I understand the noble and learned Earl is prepared to make.

EARL OF SELBORNE:—

My Lords, in this case money of a lunatic was invested, by order of the Lords Justices having jurisdiction in lunacy, in purchases of land, which, under their Lordships' direction, were conveyed to trustees upon trust for the lunatic, his executors, administrators, and assigns, with a declaration that the lands so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and re-investment, which were contained in the deed) should, "to all intents and purposes, be considered as part of the personal estate" of the lunatic. After the death of the lunatic, who never recovered, the Crown claimed probate duty upon his interest under this trust, as part of his personal estate and effects at the time of his death, which, by virtue of the probate of his will (made before the lunacy) became vested in his executors. A Divisional Court of the Queen's Bench Division held the Crown entitled to the duty so claimed; but that judgment was reversed by the Court of Appeal. The question is important; and it might have been expected to have been previously the subject of judicial decision. But no authority directly in point was cited at the bar.

It is to be observed that in this case the lunatic, to whom the money laid out in these purchases belonged, never himself did, or assented to, any act by which it was or could be converted into realty; he was incapable of doing any such act, or of giving any such consent. And although I do not think it is open to dispute that the Lords Justices, in the due course of the administration of his estate in lunacy, might have done any act which they judged to be for his benefit, it is to me clear that, in this case, they did not judge it necessary, or for his benefit, to do any act which would have the effect of converting his personal right to the money thus invested into a real right to land with the incidents belonging to realty; but that, on the contrary, they intended to prevent the investment which they authorized from having any such consequence, and introduced both into their

own order, and into the conveyance which followed thereon, declarations which they considered proper and sufficient to effectuate that intention.

Under these circumstances, I think the present case undistinguishable in principle from those in which trustees without authority, or the guardians of an infant or committees of a lunatic without the sanction of any Court, have invested personalty belonging to the trust, or to the infant, or the lunatic, in the purchase of lands of inheritance, nothing being afterwards done to supply the original want of authority. The Lord Chancellor and the Lords Justices in Lunacy, high as are their functions, and regulated as those functions are by statute, act not as proprietors, but only as guardians and administrators of the lunatic's property; and, whatever power they may have to convert any part of it from realty into personalty, or from personalty into realty, when judging this to be for his benefit, and deliberately intending to do so, it is, in my opinion, neither necessary nor right to ascribe that effect to an investment which they have authorized on the terms, and with the declared intention, that it should not have that consequence. If an investment, de facto, in land may leave the original personal right to the money invested unchanged in equity, for want of authority in the persons making that investment to change it, so (in my judgment) may a similar investment, made under the direction of a Court, which declares, both in the order and in the conveyance, that it intends the personal right to remain unchanged, and does not mean to exercise any authority which it may possess to change it. In such a case, little or nothing appears to me to depend upon the mere technical form of the conveyance to the trustees.

In this respect, I am unable to perceive any ground for making a difference between an investment of a lunatic's personal estate in land under the authority of the Lord Chancellor or the Lords Justices in Lunacy, and an investment of an infant's personal estate in land (the terms of the order and of the conveyance in trust being assumed to be in each case similar), under the authority of the Court of Chancery, or the High Court of Justice. There may be differences in some other respects; but in this respect I think there is none.

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Some of the older authorities, applicable to cases in which the investment has been unauthorized, are referred to in the first volume of Sir Edward Williams' book on Executors and Administrators (7th ed.), pp. 666 and 667. Two of these were cases of infants (*Gibson* v. *Scudamore* (1), and *Witter* v. *Witter* (2)); and one, that of a lunatic (reported under the name of Lord Plymouth, as Committee, in Freeman's Chancery Cases, p. 114, and under the title of *Awdley* v. *Awdley* in 2 Vern. 193). In *Gibson* v. *Scudamore* (1) the Court treated the purchase-money as in equity charged on the estate. In *Witter* v. *Witter* (2) the same Lord Chancellor (Lord King) said: "The renewed lease, though for lives, shall follow the nature of the original one, and go to the executors or administrators of the infant, as that should have done. . . . This might and ought to have been declared in trust for the executors and administrators of the infant, if he should die during infancy." Lord King there pointed out, as proper to preserve the personal character of the right during infancy, the same form which was afterwards used by the Court in the case of *Bridges* v. *Bridges* in 1752 (3); and which was followed with approval by Lord Eldon in 1801 (in *Ashburton* v. *Ashburton* (4)) expressly to prevent the Court from "changing the nature of the property." That form was for a long period of time, and under very great judges, sanctioned by the general course of the Court of Chancery in such cases. I do not see how your Lordships could now hold a trust, declared in such terms, to be ineffectual for the preservation of the personal right, with its proper incidents (of which the devolution of the equitable title to executors or administrators was certainly not the least important, nor the least distinctly in view), without practically declaring that all those judges were mistaken, and that the course of the Court of Chancery, in those cases, proceeded upon a misconception of the powers of the Court, and of the effect in equity of what it authorized to be done.

In the old lunacy case, as reported by Freeman, the Lords Commissioners (in 1690) held "that the administrator should

(1) 1 Dick. 45.
(2) 3 P. Wms. 99.
(3) Seton on Decrees, 2nd Ed., p. 345.
(4) 6 Ves. 7.

have the benefit of the purchase, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out of the money would alter the case, then it would be in the power of the grantee of the custody to prefer the heir or administrator, as he pleased;" and they said, "This Court may either follow the land purchased, or the estate of my Lord Plymouth." The report of the same case in Vernon (1) gives an extract from the decree, which declared, "that it was not in the power of any committee to alter the nature of a lunatic's estate;" and adds, that the decree, in effect, declared the money laid out in the purchase to be a charge upon the land.

It is true that, although it was not in the power of a committee, it is in the power of the Lord Chancellor or the Lords Justices in Lunacy to change the nature of a lunatic's estate, and also that there is not, when that authority has given its sanction to an investment in land, any personal liability to make good the amount invested, as there was in Lord Plymouth's case. But it is contrary to the general principle and course of the administration in lunacy to change the nature of a lunatic's personal estate into realty, unless it is judged, for special reasons, to be for his benefit to do so; and a power to change the nature of the estate, not exercised or intended to be exercised, appears to me to leave the case just as if there had been no such power; and, although there is no personal liability, the alternative remedy remains of "following the land," that is, of treating the land as in the nature of a security for the money invested, with the chance of loss or increment to be worked out, either by a sale as the proper and necessary means of effectuating the trust declared, or under the powers of a Court of Equity. The lunatic had, in my opinion, under the orders for these investments, and the trusts declared pursuant thereto, such a personal right, transmissible to his executors, and which vested in them by virtue of their office. If so, no election by any person, beneficially interested, after the lunatic's death to take the land in specie, could displace the right of the Crown to probate duty, or the rights of creditors or legatees to be paid in a due course of

(1) Raithby's Ed., vol. ii., p. 194, n.

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administration. This case, therefore, is governed, in my opinion by the principle on which *Attorney-General* v. *Brunning* (1) and *Attorney-General* v. *Hubbuck* (2), were determined, although it differs in specie from those cases. The Court of Appeal seems to have thought that the declarations by which the Lords Justices manifested their intention to prevent the conversion of the lunatic's personal estate into realty might, for some purposes, be effectual, though not for the purpose of preserving the personal right, so as to vest in his legal personal representatives and become liable to probate duty. That is not, to my mind, a distinction resting upon satisfactory grounds. If the necessary effect, in equity, of the investment as made, with a declaration of trust in the form which was approved by the Court in this and doubtless in many other cases, were to make the purchased property real estate of the lunatic, and to extinguish the personal right of his executors or administrators to follow the money invested, and call for its extrication from the land (with or without the assistance of a Court of Equity); and if the question had been, as was insisted by the learned counsel for the respondents, merely one of conversion of real estate into personal, and not of the preservation, unconverted in equity, of an antecedent personal right; then I could understand that the Lords Justices might have had no jurisdiction to alter the devolution of the lunatic's real estate after his death, and to cause it, under any form of trust depending for its equitable effect upon their authority only, to pass to executors or administrators instead of heirs (*Fitch* v. *Weber* (3)). But that is not the view which I take of the present question.

I, therefore, think that the order appealed from ought to be reversed, and the order of the Queen's Bench Division restored, with costs.

LORD WATSON:—

My Lords, at the close of the first hearing I formed the opinion which I have seen no reason to alter, that the Crown ought to

(1) 8 H. L. C. 243, 260. (2) 13 Q. B. D. 275.
(3) 6 Hare, 145.

prevail in this appeal. Having had an opportunity of considering the judgment prepared by my noble and learned friend, Lord Macnaghten, and finding there all that I could have wished to say in support of my own conclusion, I resolved not to trouble your Lordships with any observations of mine. I entirely concur in the judgment which has just been delivered by the noble and learned Earl.

LORD FITZGERALD:—

My Lords, the committees of the estate of Sir Henry Meux thought that it was advisable that the large accumulations of money standing to the credit of the lunatic's estate should be invested in the purchase of real estate, but could not do so without the sanction of the Court, to be obtained on establishing to the satisfaction of the Court that it was for the benefit of the lunatic that the investment should be made.

The committees entered into a preliminary negotiation with the Earl of Clarendon for the purchase of an estate, and obtained from the Court the order of the 27th of April 1865 authorizing the committees on behalf of the lunatic to employ competent surveyors to ascertain the value of the estate, and to enter into a provisional contract for the purchase subject to the approval of the Court.

The provisional agreement for purchase was made on the 19th of June 1865, by which the Earl of Clarendon agreed to sell to Sir Henry Meux, and the said Sir Henry Meux by his committees agreed to purchase, the freehold and inheritance of the estate in question for £225,000. On the ordinary reference the Master in Lunacy reported that it was fit and proper, and for the benefit of the lunatic, that the provisional contract should be adopted and carried into effect. On that report the ordinary reference was made by the Court to settle a proper conveyance to the committees "in trust for the said Sir Henry Meux his executors administrators and assigns, with a *declaration* that the said estate is to be considered as part of the personal estate of Sir Henry Meux."

In pursuance of that order the conveyance of the 30th of June 1866 was settled and executed to the committees and their heirs

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in trust for Sir Henry Meux his executors administrators and assigns, and it was thereby "declared that the manors, advowsons, hereditaments and premises hereinbefore expressed to be hereby granted are to all intents and purposes to be considered as part of the personal estate of the said Sir Henry Meux." The purchase was so completed because it was judicially considered that to do so was for the benefit of the lunatic, and it was probably at the time a wise determination having regard to his position, the state of his family, and the provisions of his will made whilst he was of sound mind.

We are now dealing with this case for revenue purposes only. As the Inland Revenue Act declares that probate duty is to be paid "on the estate and effects in respect of which probate is to be granted," and as the imposition of a duty of the kind requires clear and unambiguous language which ought not to be extended so as to embrace matters not plainly within the purview and intention of the Legislature, I had led myself to think that the question was, What was the character of this estate at the time of the death of Sir Henry Meux? On that question there could be no real difficulty. It was "land" purchased for his benefit, and remained such to the period of his death, and was not subject to any contract or obligation to treat it otherwise than as land or to any trust or duty in any one as against Sir Henry Meux to reconvert that land into money, nor was there any right in any one to call for its reconversion. It seemed to me, therefore, that it would be simpler and more in accordance with the sound construction of the statute and with principle to consider this estate *for revenue purposes* to be what it physically was—"land"—and not subject to probate duty as if personal estate, but coming under other Acts for the purposes of duty or taxation as real estate, and liable to taxation or duty in that character.

We have had the benefit of two arguments characterized by learning and ability, and I have read the judgment of the noble and learned Earl and the judgment of the noble and learned Lord who is to follow me (Lord Macnaghten), accompanied by reasons of a weighty and exhaustive character. It seems that for a great length of time a theory has existed in equity, which has been carried into effect in practice, that an investment of the money

of a lunatic in the purchase of land under such conditions as are now before us does not change its character or its destination. It remains "money" for all intents and purposes and unchanged in character during the continuance of the lunacy, and up to and at the time of the death of the lunatic if he has had no lucid interval.

I think it would be unsafe and unwise to shake a doctrine and a practice so long established and acted on, and on that ground I concur in the conclusion at which the noble and learned Earl has arrived.

LORD MACNAGHTEN:—

My Lords, on the death of the late Sir Henry Meux, a lunatic, the Crown claimed probate duty in respect of the value of a freehold estate in Wiltshire, known as the Wootton Bassett estate, which had been purchased during the lunacy, under the authority of the Court, out of the lunatic's personal estate.

The Divisional Court allowed the claim. The Court of Appeal decided the other way. From that decision the Crown has appealed.

It was admitted by the learned counsel for the respondents that whatever is actually or constructively personal estate—whatever is personal estate either at law or in equity—becomes on the death of the owner subject to probate duty. This admission reduces the case to the simple question, What was the true character of the Wootton Bassett estate at the death of Sir Henry Meux?

To answer that question it is necessary to consider the circumstances under which the estate was purchased, and the terms and conditions on which the purchase was sanctioned by the Court.

Sir Henry Meux was found a lunatic in 1858. He had been married in 1856. His wife was alive, and there was one child of the marriage, the present baronet, who is a respondent. Sir Henry Meux was a person of considerable wealth, and in receipt of a large income from the well-known brewery business in which he was engaged. He continued to be of unsound mind from the date of the inquisition until his death, which occurred in 1883, and during all that time his estate of course was under the care of the Court.

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The principles on which the Court acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession.

This is no new doctrine. In substance it is to be found in the Statute de Prerogativâ Regis, which has been construed as impliedly forbidding the investment of a lunatic's personal estate in the purchase of land: *Awdley* v. *Awdley* (1). Lord Hardwicke lays down the rule on more than one occasion. In *Ex parte Annandale* (2) he says, "In cases of lunacy the first care of the Court is the maintenance of the lunatic, and after that it is a rule never departed from not to vary or change the property of the lunatic so as to effect any alteration as to the succession to it." In 1772, in a case which was much considered (*Ex parte Grimstone* (3)), Lord Bathurst expresses himself as follows: "It was said to be a general rule that the Court will not alter the lunatic's property to the prejudice of his successor. Rightly understood, it is true. The Court will not buy or sell land for him; but in the management of the estate the governing principle is the interest of the lunatic." In 1793, in *Oxenden* v. *Lord Compton* (4), Lord Loughborough makes the following comments on Lord Bathurst's judgment in *Ex parte Grimstone* (3):—"If the Chancellor was continually looking to the right and left and weighing the probable interest of the representatives, the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate tanquam bonus pater familias, making every advantage fairly to increase and improve it without engaging in risks and

(1) 2 Vern. 192.
(2) Amb. 79.
(3) 4 Bro. C. C. 235, n.; reported also in Amb. 706.
(4) 2 Ves. 69, 72, 73.

dangerous adventures, for those are not fit enterprises. But whatever leads towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate. But when I am laying down this so generally I must be understood to do it with this guard, that great care must be taken that nothing extraordinary is to be attempted, as estates to be bought or interests to be disposed of. Alteration of property is, as far as possible, to be avoided consistently with the idea of preserving the interest of the proprietor." In *Re Badcock* (1) Lord Cottenham, while declining to listen to objections on the part of the next of kin, in a case of ordinary repairs, observes that "if the money were laid out in the purchase of land, or what would amount to the same thing, in building a farm-house, it would be right that the sum so laid out should retain its character of personalty."

If the rule which guards against alteration in the character of a lunatic's property should seem to require authority over and above that derived from the statute of Edward II., and the long continued practice of the Court, such authority may, I think, be found in the views of the Legislature as declared in the Lunacy Regulation Act 1853 and the earlier enactments embodied in that statute. The Act of 1853 provides (sect. 118) for raising money for certain purposes by sale or mortgage of the lunatic's property. It provides (sect. 119) that if the money is raised by sale or mortgage of the lunatic's "land" (which comprehends all property other than "stock" as defined by the Act), the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in any surplus moneys as he or they would have had in the property if no sale or mortgage had been made, and that "the surplus moneys shall be of the same nature and character" as the estate sold or mortgaged. The Act also provides (sect. 118) for charging the lunatic's land with the expenses of permanent improvements if it appears to be for the lunatic's benefit, and enacts that if the money required is advanced out of the lunatic's general property it is to be secured "to some person as a trustee for him as part of his personal estate." Indeed the principle is of wider appli-

(1) 4 My. & Cr. 440.

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cation still. For example, it extends to cases where private property is taken for quasi public purposes under the authority of Parliament. To quote James L.J.'s observations in *In re Barker* (1), "Where property is taken compulsorily from any person who is not sui juris, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property which would naturally follow such change, the presumption is, if the words in the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or legitimate expectations of any persons whatsoever." That, as the Lord Justice says, is "a broad general principle."

In dealing with the property of lunatics, in late years at any rate, and since the Act of 1853, the Court has given effect to the rule in cases which at first sight appear to lie rather on the line, and which might possibly have been dealt with differently but for the Act. I will only refer to two instances. In *Re Leeming* (2) a mortgage created by an ancestor of the lunatic was paid off out of the lunatic's personal estate. The mortgage was kept alive, and on the death of the lunatic, intestate, it was held that the sum expended out of personal estate in paying off the mortgage ought to be raised out of the real estate comprised in the mortgage and dealt with as personal estate. In *In re Ryder* (3) the Court sanctioned the enfranchisement of a copyhold estate belonging to a lunatic, but as the descent of copyholds in the manor was different from the descent of freeholds, the Court made a declaration for the purpose of carrying the equitable interest in the enfranchised copyholds, in the event of the lunatic dying intestate, to the persons who would have taken the property if it had not been enfranchised. In making the order, the late Master of the Rolls, referring of course to cases outside the ordinary course of management, observed that it was "a settled principle in lunacy that the Court would not alter the rights of succession to the lunatic's property."

I have dwelt at some length on this part of the case, because it seems to me that if the rule is established, the contention of

(1) 17 Ch. D. 241.

(2) 3 D. F. & J. 43.

(3) 20 Ch. D. 514.

the Crown must prevail, unless it can be shewn that there was some oversight or blunder on the part of the Court when it sanctioned the purchase of the Wootton Bassett estate.

Now let me invite your Lordships' attention to what occurred on the occasion of the purchase. It appears that in 1866 the Wootton Bassett estate was for sale. It was considered a very desirable property. The price was over £200,000, but there were ample funds resulting from the accumulation of income from the brewery business standing to the credit of the lunacy. Under these circumstances the committees of the lunatic's estate presented a petition asking for leave to buy the property on behalf of the lunatic. It was not disputed at your Lordships' bar that the Court had power to sanction the purchase. Whatever the origin of the power may have been it is too late to dispute its existence. But unquestionably such a purchase was altogether outside the ordinary course of administration of a lunatic's estate, and therefore, as it seems to me, if the Court thought fit to sanction the purchase, it was bound to take care that the character of the lunatic's property was not altered. Knight Bruce and Turner L.JJ., sitting in lunacy, approved the purchase and declared it to be for the benefit of the lunatic, proceeding, I presume, upon the footing that the proposed expenditure was an outlay which a person of sound mind in the pecuniary position of Sir Henry Meux might not unnaturally consider desirable in the interests of his family. At the same time they laid down the conditions on which the purchase was sanctioned, and they prescribed the form of the conveyance. The property was to be conveyed to trustees "upon trust for Sir Henry Meux, his executors, administrators, and assigns," with a declaration that the estate was "to be considered as part of the personal estate of Sir Henry Meux."

If it had not been for the judgment of the Court of Appeal, I should have thought the meaning and effect of the transaction clear. The committees had no power of themselves to lay out the lunatic's personal estate in land. "It was not in the power of any committee," as the decree in *Awdley* v. *Awdley* (1) expressly declared, "to alter the nature of a lunatic's estate." The

(1) 2 Vern. 194, n.

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purchase could only be made with the sanction of the Court. In giving its sanction it was surely competent for the Court to impose such terms, not inconsistent with law, as it thought right. Terms so imposed are I think to be treated as binding and effectual. I read the order as authorizing the proposed purchase on the terms, that the money to be laid out in the purchase was to retain its character, and that the property was to be conveyed to trustees upon trust to be held and applied as part of the lunatic's personal estate, which the Court then and there declared it to be. The language of the order seems to me to be framed for the purpose of impressing upon the property to be purchased the character of personal estate from the moment of the purchase, during the lunatic's lifetime, as well as after his death. The conveyance carries out the order of the Court in terms. It recites the order. It conveys the property precisely as the Court directed it to be conveyed. It repeats the declaration which the Court prescribed, and which is none the less the declaration of the Court because it is embodied in the conveyance. A trust for sale would have made the conveyance no better and no worse. Practical effect under the circumstances it could have none. I do not see why a sort of magical effect should be attributed to it.

The Court is guided by the same principles and speaks in the same language, whether it is sitting in Chancery or in Lunacy. The origin of the Crown having the custody of idiots and lunatics is, as Lord Bathurst said in *Ex parte Grimstone* (1), "more matter of curiosity than use." He adds that it certainly existed before the Statute de Prerogativâ Regis, and that "after custody is granted the Great Seal acts in matters relative to the lunatic not under the sign manual, but by virtue of its general power as Keeper of the King's Conscience." The observations of Lord Redesdale in *Re Fitzgerald* (2) are to the same effect. Now the order of the Lords Justices was not a novel experiment in lunacy administration, nor was it couched in language unfamiliar to Courts of Equity. In *Simon Degge's Case* (3), it appears that the lunatic was entitled to a freehold lease held for three lives, of

(1) Amb. 706. (2) 2 Sch. & Lef. 432.
(3) 4 Bro. C. C. 235, n.

which the lunatic was ultimately the survivor. On the dropping of each of the other two lives, the lease was renewed under the order of the Court, and the fines and charges were paid out of the lunatic's personal estate. On each occasion it was ordered, in the one case by Lord Hardwicke, in the other by Lord Northington, that the interest in the renewed lease during the life added was to be considered as part of the lunatic's personal estate for the benefit of his next of kin. Those orders were commented on by Sir Edward Sugden in *Leitrim* v. *Enery* (1), and certainly he appears to treat them as well founded and effectual for the purpose of preserving the character of the lunatic's estate. In Elmer's Practice in Lunacy, 6th edit. p. 206, a precedent is given of an order sanctioning the purchase of a house for the residence of a lunatic. It orders "that the property to be so purchased, be deemed and taken to be part of the personal estate of the lunatic." It directs that the conveyance be made to trustees "upon trust for the lunatic, his executors, administrators, and assigns." The order, it appears, was made on the 7th of December 1860, by Knight Bruce and Turner L.JJ. It is obvious from the very nature of the case, that there it must have been intended to preserve the character of the lunatic's property as personal estate. And so I think this order has an important bearing on the question before your Lordships, whether it was specially framed by the learned Judges who pronounced it, or taken, as is more probable, from an earlier precedent.

Turning now to the practice in the Court of Chancery, we find in Seton on Decrees, 3rd edition, vol. ii. p. 692, a precedent on precisely the same lines, which was in use in the Court of Chancery for some hundred years (2). It is the form of order employed before the Wills Act, when real estate was purchased with personalty belonging to an infant. The object was to pre-

(1) 6 Ir. Eq. Rep. 357.

(2) "Let the estates mentioned in, &c., be conveyed to trustees to be approved, &c., in trust for the plaintiff (infant), his executors, administrators, and assigns. And let the conveyances be settled by the (Judge). And declare that such trustees are to stand seised of the said estates in trust for the plaintiff, his executors, administrators, and assigns, as part of his personal estate. And in case the plaintiff shall live to attain the age of twenty-one years, then let the said trustees convey and assure the said estates to the plaintiff, his heirs, and assigns, for ever: *Bridges* v. *Bridges*, M.R. 30 July, 1752, A. 559."

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serve the character of the property, and thus to enable the owner, though an infant, notwithstanding the outward form of the property, to deal with it by will. That precedent had the sanction of Lord Eldon and seems to have been uniformly adopted by him when the occasion required it. See *Ashburton* v. *Ashburton* (1); *Ware* v. *Polhill* (2). The efficacy of that precedent was never questioned. If such an order was efficacious in the case of an infant, why is it futile, or less efficacious, in the case of a lunatic?

The result of the judgment of the Court of Appeal, if I collect it rightly, seems to be this:—the Wootton Bassett estate, though bought with the lunatic's personalty, was land, and nothing but land; real, not personal estate; the equitable fee vested in Sir Henry Meux either under the limitations of the conveyance, or through a resulting trust; the declaration that the property was to be considered part of the lunatic's personal estate was not a matter which could take effect during his lifetime; but in the event of his dying intestate, and in the event of his heir and next of kin being different persons, the estate was not to descend according to the ordinary rules of real property; it was to "follow the route taken by the personal estate" and devolve on the next of kin. That, my Lords, I apprehend is an impossible disposition. Real estate must descend according to the ordinary rules of real property. You cannot give real estate in fee, and say that on the death of the owner intestate it shall go to his next of kin. I venture to think that the Court has no power to make such a disposition. So far as I am aware it has never attempted to do anything of the kind. Certainly I should hesitate to attribute such an experiment to the Lords Justices Knight Bruce and Turner. In *Holmes* v. *Godson* (3) it happened that they themselves had to consider a very similar disposition. In a most learned and exhaustive judgment, Turner L.J. sums up the law in the following words: "The law has said that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of law and therefore void."

(1) 6 Ves. 5. (2) 11 Ves. 278.
(3) 8 De G. M. & G. 152, 165.

It may be observed that if the judgment of the Court of Appeal is right, the Lords Justices in sanctioning the purchase of the Wootton Bassett estate, did that which might have led to a practical difficulty. In the opinion of the Court of Appeal the Lords Justices converted the lunatic's personal estate into real estate; they then had no power to reconvert it; thenceforward the Court in Lunacy had only certain limited powers of sale over the property under the Act of 1853. Now, if that were so, and if any misfortune had happened to the brewery business and the money invested in the Wootton Bassett estate had been wanted for the purpose of the business, it would have been found that the Court had tied its own hands, and that while professing to act for the benefit of the lunatic, it had put a fetter upon his property which it would have been difficult, if not impossible, to remove. On the other hand, if the land were impressed with the character of personal estate, actual conversion, if required, would always be in the power of the Court.

Stress was laid on the power of sale and exchange contained in the conveyance. I am at a loss to see how that can affect the question. It is a usual power. So long as the property retained the form of real estate it might have been extremely useful. But it does not shew that the real character of the property was the same as its outward form.

It was said that the Lords Justices had the lunatic's will before them when they sanctioned the purchase, and that the will gave everything to the only child. True. But he might have died in the lunatic's lifetime, or he might have survived the lunatic and died under age. In view of either event, and I may add in view of the testator's directions as to the surplus income of his estate, it seems to me that it was specially incumbent on the Court to preserve the character of the lunatic's property.

In the course of the argument some faint reliance was placed on the case of *Matson* v. *Swift* (1). In that case there was equitable conversion during the testator's lifetime; actual conversion after his death. The proceeds were in Court. The Crown claimed probate duty. The argument on behalf of the next of kin, and the decision of the Court, proceeded on the ground that the right

(1) 8 Beav. 368.

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to probate duty depended on the actual form and condition of the property at the death: that the Crown was not entitled to enforce, for fiscal purposes, equities between private parties: and that real estate, though converted out and out, was not within the jurisdiction of the Ordinary, nor part of the "estate and effects, for or in respect of which probate" is granted under the Act of George III. That view is perfectly intelligible. But after the decision of this House in *Attorney-General* v. *Brunning* (1) it was thought to be inconsistent with the grounds on which that case was decided, and it seems to have been finally exploded by the reasoning of James L.J., then Vice-Chancellor, in *Forbes* v. *Steven* (2), which met with general acceptance, and has been followed in *Attorney-General* v. *Lomas* (3) and *Attorney-General* v. *Hubbuck* (4), both of which cases relate to probate duty. In connection with this point it is to be observed, that although the Probate Court never recognised the doctrine of equitable conversion, a different view is now taken in the Probate Division. In *In the Goods of Gunn* (5) the President granted probate of a married woman's will or appointment dealing only with real estate, which had been impressed with the character of personal estate, and he concluded his judgment in these words: "I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted. Probate must issue."

Under these circumstances it seems to me that no reliance can be placed upon *Matson* v. *Swift* (6), or, I may add, upon any of the glosses on that case, which it is difficult, I think, to understand, and still more difficult to reconcile with the facts as they appear in Mr. Beavan's report.

It was not easy to apprehend the precise view which the learned counsel for the respondents took of the order of the Lords Justices, and the conveyance of the Wootton Bassett estate. One thing, however, was clear. They did not accept the view of the Court of Appeal in its integrity. They admitted that the decla-

(1) 8 H. L. C. 243.
(2) Law Rep. 10 Eq. 178.
(3) Law Rep. 9 Ex. 29.
(4) 13 Q. B. D. 275.
(5) 9 P. D. 242.
(6) 8 Beav. 368.

ration that the property was to be considered part of the lunatic's personal estate for what it was worth, applied, or might apply, for the purposes of administration during the lunatic's life. They did not conceal their opinion that, in the event of the lunatic dying intestate, and his real estate and personal estate becoming separated, the heir would have had a better claim to the Wootton Bassett estate than the next of kin. So that on two points, one of which goes to the root of the decision of the Court of Appeal, the counsel for the respondents were at odds with the judgments they attempted to support. It seemed to me that if they had not been hampered by those judgments in their favour, they would have preferred to argue, as they appear to have argued before the Court of Appeal, that the declaration of the Lords Justices had no effect at all. And rightly. The truth is, you must either give the order and conveyance their full meaning and effect, or you must hold that the declaration that the property was to be considered personal estate had no force or operation whatever, and that the order of the Lords Justices was a blunder.

For the reasons I have given I decline to adopt the latter alternative. I think it was the duty of the Court in Lunacy to preserve the character of the lunatic's property. I think the Court plainly intended to do so. I think the order and conveyance were effectual for the purpose. And therefore I am of opinion that the order of the Court of Appeal must be reversed.

Order appealed from reversed; decree of the Queen's Bench Division restored; respondents to pay to appellant the costs both here and below; cause remitted to the Queen's Bench Division.

Lords' Journals 8th August 1887.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Hunters, Gwatkin & Haynes; Baker, Folder & Upperton.*

[HOUSE OF LORDS.]

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STUMORE, WESTON & Co. . . . . APPELLANTS;

AND

MICHAEL BREEN . . . . . RESPONDENT.

Ship—Bill of Lading—Liability of Master for Error in Date in Bill of Lading —Ship's Brokers—Authority of Broker.

The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is carried does not give them implied power to relieve the master, when he signs bills of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bills. For breach of that duty the master is liable to his owners.

APPEAL from a decision of the Court of Appeal (Lord Esher M.R., Baggallay and Bowen L.JJ.).

The following statement of the facts is taken from the judgment of Lord Watson in this House.

The appellants are owners of the steamship *Lilburn Tower*, of which the respondent, Michael Breen, was at one time the master.

By letter of 8th August 1883 the appellants informed the respondent that the vessel, which was then at Genoa, had been "fixed home from Odessa to Antwerp," and directed him, after discharging, to "proceed to Odessa and apply to Messrs. McNabb, Rougier, & Co. for cargo." On the 31st of August the appellants again wrote to the respondent, "You must, as before advised, proceed to Odessa, where you are consigned to McNabb, Rougier, & Co. Get the ship loaded as quickly as possible. You will find McNabb will give you every assistance in his power."

The *Lilburn Tower* arrived at Odessa on the 4th, but owing to quarantine regulations was not ready to load until the 13th of September 1883. On the 19th September the respondent signed bills of lading for 1640 chetwerts of maize shipped by M. Fischerovitch, and also for 2190 chetwerts of oats shipped by Luigi Solari. In point of fact, the maize was shipped on or after the 14th of September, but the bills of lading bore to be "Dated in Odessa, 31/12 September, 1883." In like manner, although the

oats were not shipped until on or after the 16th day of the month, the bills of lading contained the words, "Dated in Odessa, 2/14 September, 1883." The first figures in these entries refer to the same dates as those which follow, according to old style.

The parcel of maize was shipped by M. Fischerovitch as in implement of a contract of 24th of August 1883, by which he had sold to Pirenne & Co., of Antwerp, about 1500 chetwerts of maize, to be shipped at Odessa in the month of August, old style, so that the latest date of shipment under the contract was the 12th of September, new style. M. Fischerovitch, in a letter dated 1/13 September 1883, forwarded an invoice to Pirenne & Co., and intimated that in pursuance of the contract he had drawn upon the Antwerp Bank at three months date for the invoiced amount. After the arrival of the shipping documents, the bank accepted the accompanying draft on behalf of Pirenne & Co., the consignees.

The parcel of oats was shipped under a somewhat similar contract between Solari and Collignon Frères, of Antwerp, dated the 24th of August, 1883, in terms of which the shipment was to be "prompt by steamer." It is admitted that, in mercantile language, that expression means within three weeks from the date of the contract, so that the time for shipment expired on the 14th September. An invoice was sent to Collignon Frères by letter dated the 14th, but not posted until the 17th of September, and the shipping documents and a draft for the amount of the invoice were forwarded to Messrs. de Wolf, bankers in Antwerp, who accepted on behalf of the consignees.

On the arrival of the *Lilburn Tower* at Antwerp, Pirenne & Co. and Collignon Frères, the consignees, ascertained from her log book, that, as they had previously suspected, the maize and oats had not been shipped within the contract periods. There had been a steady decline in the market after the date of their contracts, and the consignees had an interest to reject, and accordingly did reject the grain as disconform to contract, and instituted legal proceedings against the appellants and their ship for recovery of the loss which they had sustained by their acceptance of the drafts of their vendors. The appellants being advised that in respect of the ante-dating of the bills of lading they had not,

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according to Belgian law, a good defence against these claims, settled with Pirenne & Co. and Collignon Frères on the footing of paying to them the differences between the amount of their acceptances and the sums realised by sale of the grain.

This appeal is taken in a suit thereafter brought by the respondent for recovery of the sum of £190 5*s.* 4*d.* due to him for his wages and disbursements, as master of the *Lilburn Tower*, and of another steamship also belonging to the appellants. In their defence the appellants did not dispute either their indebtedness or its amount, but they stated a counter-claim for £437 10*s.* 3*d.*, being the amount of the sums paid by them to the indorsees of the bills of lading.

The case went to trial before Field J. and a jury. The learned judge submitted two questions to the jury, first, whether the plaintiff was negligent in signing the ante-dated bills of lading? and, secondly, whether the indorsees accepted the consignors' drafts upon the faith of the dates of shipment contained in these bills? The jury found that the signing of the bills of lading was not negligence on the part of the plaintiff, and they also found that the indorsees did not accept upon the faith of the statement contained in the bills of lading. The presiding judge thereupon intimated that verdict and judgment would be entered for the now respondent both upon his claim and the appellants' counter-claim.

The appellants then moved the Divisional Court to set aside the verdict and judgment entered, and to enter judgment for them, or otherwise to make an order for a new trial, on the grounds that the verdict was contrary to evidence, and that the judge had misdirected the jury. The Court, consisting of Grove J. Denman J. and Wills J., on the 17th of June 1885, ordered "that the verdict obtained on the trial of this action and judgment, if any, be set aside, and a new trial had between the parties."

An appeal by the respondent against that order was, on the 1st of July 1885, allowed, with costs, by the Court of Appeal, who further directed that the verdict found and the judgment entered for the plaintiff with costs at the trial of the action be restored. The decision of the Court of Appeal was given on the ground that the evidence was sufficient to warrant the finding of

the jury upon the first question submitted to them by Field J. In that view of the case it was unnecessary for their Lordships to consider, and they did not, in the judgments which they delivered, express any opinion in regard to the propriety of the jury's finding upon the second question.

From that decision the defendants appealed.

1886. Nov. 22, 23. *Finlay* Q.C. and *J. Gorell Barnes* for the appellants, contended that the decision of the Divisional Court was right; that the verdict was against the weight of evidence; that Field J. had misled the jury; that the duty of the master was "not to permit the insertion of statements in the bill of lading at variance with the fact": Abbott on Shipping (12th ed. by Prentice) p. 259; and that the brokers had no authority—either express in this case or implied by law—to relieve the master from this liability.

J. G. Witt (*Arthur Charles* Q.C. with him) for the respondents contended that the decision of the Court of Appeal was right.

J. G. Barnes replied.

The House took time for consideration.

Dec. 10. LORD WATSON (after stating the facts in the words above given proceeded as follows):—

My Lords, in the argument addressed to your Lordships the appellants' counsel maintained that there ought to be a new trial, because the verdict of the jury upon both questions was contrary to evidence. They did not complain that the learned judge had either misdirected, or had failed rightly to direct, the jury in point of law; but they did complain that his observations upon the evidence, and the inferences of fact which might be legitimately derived from it were calculated to mislead the jury. The first matter, therefore, which must be considered is, how far the evidence warrants the inference drawn by the jury that the signing of these ante-dated bills was not negligence on the part of the plaintiff.

There are one or two points bearing upon this part of the case

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Lord Watson.

which were not made the subject of controversy at your Lordships' Bar. It was not disputed that the date, or time of signing, is a material part of a bill of lading; and that is obviously the case, because, according to the tenor of the document, the insertion of a particular date amounts to a distinct representation that the goods had actually been put on board before the time specified. Neither was it disputed that it is the special duty of the master of the ship to attest, by his signature, the date as well as the fact of shipment. He is not bound to superintend in person the receipt and stowage of the goods; but if he is not personally cognisant of the fact and time of shipment, it is his personal duty to inform himself upon both these points, by an examination of the mate's receipts or of the log-book, or otherwise, before he signs a bill of lading for the goods.

It appears to me to be altogether immaterial whether the failure of a ship-master to check the date of a bill of lading which he signs be described as breach of duty, or as negligence. I do not think his failure to do so can be legally excused, unless he can shew either that he was relieved of the duty (in which case there can be neither breach nor neglect), or that he made an honest endeavour to perform it, and failed through no fault of his. Of course the owner may supersede in so far the functions of the master, by committing to another agent the power or the duty of settling the whole terms of the bills of lading, including the fact of shipment and also the date; or he may himself prepare the bills of lading, date included, and then ask the master to sign them. In these cases, the master would incur no responsibility to his employer by putting his subscription to a completed bill of lading presented for his signature by the employer or his alter ego, without examining the date.

The facts proved at the trial, in relation to this branch of the case, admit of being very shortly stated; they raise no conflict of testimony, and there is no controversy between the parties except in regard to the inferences which may be legitimately and reasonably derived from them.

As already stated, the two bills of lading, dated respectively the 12th and 14th September 1883 were signed by the respondent on the 19th day of that month. He was not examined as a

witness, but he gave an admission, for the purpose of this action, to the effect that, at the time of signing, he was aware that the grain had not been shipped until after the dates appearing in the bills of lading. That admission is qualified by the explanation that, when he signed he was not aware of the date appearing in the bills of lading, and neither noticed the same nor had his attention called thereto; and that the fact that the grain was shipped of later dates than the dates appearing in the bills of lading was not in any way brought to his notice, and did not occur to him, and was not present to his mind. It is not directly proved by whom the bills of lading were filled up, or by whom they were presented to the respondent for signature, but they bear internal evidence of their having been prepared by or for McNabb, Rougier & Co. the ship's brokers. It appears to be conceded by the appellants (at least it is stated in their case) that the bills of lading were presented for signature to the respondent, and were signed by him in the office of McNabb, Rougier & Co. These circumstances, coupled with the terms of the letters of advice addressed by the appellants to the respondent on the 8th and 31st August 1883 constitute the whole of the direct evidence upon which the first finding of the jury depends.

The qualified admissions of the respondent clearly establish that no attempt was made by him to perform the duty incumbent on a shipmaster of seeing to the accuracy of the dates at which he certified that the goods had already been put on board. It would therefore be idle to consider whether the respondent's honest efforts to do his duty were foiled by some cause which was not imputable to his negligence. His duty was not present to his mind at the time when he subscribed and he did nothing whatever towards its performance. In these circumstances, I do not think the respondent can be exonerated from the consequences of his omission except upon the ground that he was entitled to act upon the assumption that the duty of filling in the proper dates had already been performed by some other person having authority from the appellants to do so.

Field J. in the course of his charge indicates to the jury the circumstances from which they might infer that the respondent signed in the belief that the right dates had been inserted by the

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shipbrokers, and then proceeds to define the issue to which the case was narrowed in these terms :—" Therefore, the question is whether or not what Mr. McNabb did do on this occasion was within the authority expressly or impliedly given to McNabb." I think that is the real issue which the jury had to try. I think they might reasonably infer that the bills of lading were prepared and the dates inserted by McNabb, and that the question which they had to decide was, whether the appellants had either given express or implied authority to their brokers to fix the date of shipment and to relieve their master of his duty in that respect, or had held out their brokers to the respondent as having that authority. His own admissions make it somewhat doubtful whether, at the time he signed the respondent did, in point of fact, rely upon the shipbrokers having that authority; but it would be sufficient for his exoneration to shew that they actually had, or had been held out to him by the appellants as having, such authority.

It is, in my opinion, a settled and a salutary principle of mercantile law that the mere employment of a broker, at a foreign port, to find a cargo for a ship, and to adjust the terms upon which it is to be carried, does not give him implied power to relieve the master, who signs bills of lading, of his legal duty to the shipowner. I do not doubt that, according to the ordinary course of business, the broker so employed prepares the bills of lading, because they contain the terms of the contract of carriage; and these are matters as to which he is the sole representative of the shipowner, and with which the master has no concern. But the fact of the shipment of the goods to be carried, and the date of shipment, are matters within the province, not of the broker, but of the master; and when he certifies them, as the accredited agent of the shipowner, it is his duty to do so carefully and to the best of his knowledge, and he has no right to delegate that duty to other agents appointed for other purposes by his employer. There is no evidence in this case tending to prove that the appellants authorized Messrs. McNabb, Rougier & Co. to do anything more than to act as their agents in finding a cargo for the *Lilburn Tower*. That employment carried with it many implied powers which are well known to the law and need

not be enumerated here. To the extent of such powers the brokers are undoubtedly the representatives of the appellants, but they do not include the implied power which has been claimed for the brokers, for the first time (so far as I can discover) in the present case. Not one of these implied powers appears to me to come into collision with the functions of the master in regard to his signature of bills of lading, or to relieve him, when he does sign, of the duty of seeing that those parts of the instrument for which he is responsible are correctly stated.

It has not been suggested that the appellants gave McNabb, Rougier & Co. any express authority with respect to bills of lading, and their letters of the 8th and 31st of August 1883 merely convey an intimation to the respondent that the firm in question were to act as the ship's brokers at Odessa, and that he was to look to them for the supply of a cargo. I am accordingly of opinion, with the judges of the Divisional Court, not only that there was no evidence to warrant the conclusion at which the jury arrived upon the first question, but that the facts in evidence all pointed to an opposite conclusion.

As regards the remaining branch of the case, I agree with the learned judges of the Divisional Court that the finding of the jury was against evidence, and I do not consider it necessary to add anything to the observations made by their Lordships, in which I concur. I think it was clearly shewn by the evidence that the acceptances of their vendors' drafts by Pirenne & Co. and Collignon Frères were transactions in the ordinary course of business, and that, notwithstanding their suspicions, they could not have refused to accept, without exposing themselves to a risk which no prudent merchant would have incurred. In these circumstances the onus was cast upon the respondent of proving that these drafts would certainly have been accepted by or on behalf of the vendees, even if the bills of lading, which were forwarded to their bankers in Antwerp, along with the drafts, had stated the true dates at which the goods were shipped. Of that onus the respondent has, in my opinion, utterly failed to discharge himself.

I am therefore of opinion that the order of the Court of Appeal must be reversed and the order of the Divisional Court

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restored. I think the appellants ought to have their costs both in the Court of Appeal and in this House, and I move accordingly.

LORD BLACKBURN:—

My Lords, I agree entirely with the opinion just delivered by my noble and learned friend, Lord Watson, and I do not think it necessary to add anything to the reasons he has delivered.

LORD FITZGERALD:—

My Lords, my noble and learned friend, Lord Watson, has so accurately, though concisely, stated the facts of the case in the judgment which he has just delivered, as to relieve us from any necessity for further reference to them. I so entirely concur in the result and in the reasons which my noble friend has expressed, that I would not attempt to add a word were it not that it seems to me that the decision arrived at in the Court below, and the reasons for that decision, carry with them so much danger to the security of shipowners, and have such a tendency to affect the credit of bills of lading, that I do not think it well to let them pass unnoticed.

The appellants (the defendants below) in their counter-claim allege that "the negligence and breach of duty of the plaintiff consisted in improperly signing a bill of lading for 1640 chetwerts of maize dated the 12th of September 1883, whereas the said maize was not in fact shipped on board the said vessel at Odessa until the 14th of September 1883, as the plaintiff knew, and a bill of lading for 2190 chetwerts of oats, dated the 14th of September 1883, whereas the said oats were not in fact shipped on board the said vessel until the 16th of September 1883, as the plaintiff knew."

The plaintiff in answer denies both the facts alleged and that he was guilty of any negligence or breach of duty. Every matter of fact stated in the pleading as constituting negligence and as a breach of duty has been established by evidence that is not now and was not at the trial disputed, and yet the plaintiff has had a verdict exonerating him from negligence and breach of duty.

Lord Tenterden states in his book in dealing with the duty of the master to his employer that "the great trust reposed in the master by the owners and the great authority which the law has vested in him, require on his part, and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention;" and the learned editor of the 12th edition (Mr. Prentice) adds this (I read it as a matter of advice and not as a statement of law): "The bill of lading is the written acknowledgment of the master that he has received the goods from the shipper to be conveyed on the terms therein expressed. The master should be careful not to sign bills of lading until the goods are actually delivered to him, nor to permit the insertion of statements at variance with the fact, or of a nature to mislead or give rise to misunderstanding. By doing so he may involve his owners in litigation and become responsible to them and to other parties" (1).

The plaintiff Breen in his admission that at the time he signed the bills of lading he was aware that the cargo had not been shipped until after the dates appearing in the bills of lading, qualifies it in the manner stated by my noble and learned friend. I assume that qualification to be true in all its parts, but though it may free the plaintiff Breen from the imputation of a wilful untruth it can afford no justification or excuse for his breach of duty.

Field J. in his summing-up most properly observes: "There is no question as to the master's duty. I should be very sorry to hear the smallest doubt raised in any Court of Justice anywhere, or the suggestion made that it is not the duty of the master to take care that he signs the truth under all circumstances. It is his duty to do it." And again he adds: "Of course nobody ought ever to sign a lie for anybody; but it was a lie, a plain and palpable lie, and if the master knew it and observed what the date was when he signed it, it was a plain palpable lie to him as well as to everybody else." And Bowen L.J. in the Court of Appeal says: "Now what is the true matter that we have to determine? It is this; whether the captain of this ship was guilty of any breach of duty towards his owners from which

(1) Abbott on Shipping (12th ed.) pp. 122, 259.

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damages accrued to them? What is the duty of the master? It is, first of all, to sign the bill of lading for the cargo received, and to use reasonable care and skill in seeing that the bill of lading is properly drawn up which he does sign."

Now in these observations of Field J. and Bowen L.J. I entirely concur; but it strikes me with some degree of amazement that after these observations the captain who did sign that untrue statement, and in signing it exhibited in my judgment gross want of care, has the verdict on all points. One asks what is the supposed justification or excuse for this palpable and admitted breach of duty? It is that Stumore & Co. had so constituted McNabb & Co. their representatives for all purposes connected with the bills of lading that the acts of McNabb & Co. in filling up these documents with a false date and presenting them to the master for his signature, and procuring his signature, were as much the acts of Stumore & Co. as if they had personally presented the documents to the master and required and obtained his signature. That allegation seems to me entirely to rest on the letter of the 8th of August 1883, which, in my opinion, wholly fails to support it.

This question has been so fully, justly, and clearly dealt with by my noble and learned friend that I shall only further say that I entirely agree with him and adopt his reasons.

On the second question sent to the jury I also agree with my noble and learned friend and again adopt his reasons; and on both questions it seems to me clear that there was misdirection, and even if there had been evidence proper to be submitted to the jury, yet that the summing-up of the learned judge was open to the criticisms expressed in the judgments of the Divisional Court.

I desire to add that even if the case had been submitted to the jury on a summing-up free from objection, yet in my opinion the verdict was against the weight of evidence. I will assume the proper mode of submitting the questions in the cause to the jury to be that laid down by the noble and learned Master of the Rolls. "It seems to me," says the Master of the Rolls, "the only way, and the proper way, and the clearest way of putting it to a jury is to say, You are now to say whether in your opinion this

captain under the circumstances was guilty of negligence in signing those bills of lading *without reading them*; and even by way of explaining to the jury what would be the questions for them to consider, to have said that the meaning of that is, You are to ask yourselves whether a captain of reasonable care and skill would, under the circumstances which were before him at the time, have signed the bills of lading without reading them? Whether there would have been any want of reasonable care and skill in a captain of ordinary care and skill in signing the bills of lading under the circumstances without reading them? That seems to me to be the right formula."

I should say without hesitation in answer to these questions that a master of reasonable care and skill would have been guilty of a breach of duty in signing the bills of lading, under the circumstances, without reading and without any examination of them—a breach of duty for which, if loss occurred thereby to the owners, he became responsible to them.

I feel called on also to express my opinion on the question as to whether this verdict is upon the whole against the weight of evidence, supposing that the questions were properly submitted to the jury; because it was said in the Court of Appeal that fifty juries one after another would on the same evidence find the same verdict. I will only say, with reference to that observation, that if any number of juries would on the same evidence find the same verdict, I should feel called upon to pronounce their verdicts to be perverse.

Order appealed from reversed; Order of the Queen's Bench Division of the 17*th of June* 1885 *restored; the respondent to pay to the appellants their costs in the Court of Appeal and in this House, and the respondent to repay to the appellants the costs which they have already paid: Cause remitted to the Queen's Bench Division.*

Lords' Journals 10th December 1886.

Solicitors for appellants: *W. A. Crump & Son.*
Solicitors for respondent: *Pritchard & Sons.*

[HOUSE OF LORDS.]

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BADISCHE ANILIN UND SODA FABRIK Appellants;

AND

IVAN LEVINSTEIN, LEVINSTEIN & CO., AND I. L. LEVINSTEIN & SONS . . . } Respondents.

Patent—Chemical Process.

A patent for producing colouring matters for dyeing and printing by a chemical process held valid.

The decision of the Court of Appeal (29 Ch. D. 366) reversed.

The decision of Pearson, J. (24 Ch. D. 156) restored.

APPEAL from a decision of the Court of Appeal.

The decisions of Pearson J. who held the patent good (1), and of the Court of Appeal who held it bad (2), having been reported, it becomes necessary to give some account of this appeal. Students of chemistry are referred to the reports of those decisions, where the chemical details are set out at length. For the present purpose the facts and arguments are sufficiently stated in the judgments in this House.

Jan. 31; Feb. 1, 3, 4. Sir *R. Webster* A.G. and *T. Aston* Q.C. (*W. N. Lawson* with them) for the appellants.

Feb. 7, 8, 10, 11, 14. *Napier Higgins* Q.C. and *Chadwyck Healey* for the respondents cited *Neilson* v. *Harford* (3); *Sturtz* v. *De La Rue* (4); *Turner* v. *Winter* (5); *Wood* v. *Zimmer* (6); *R.* v. *Wheeler* (7); *Wegmann* v. *Corcoran* (8); and *Simpson* v. *Holliday* (9); upon the question whether the specification was bad for ambiguity or want of distinctness, precision, fulness, &c.

Sir *R. Webster* A.G. replied.

The House took time for consideration.

(1) 24 Ch. D. 156.
(2) 29 Ch. D. 366.
(3) 1 Web. Pat. Cas. 314; Goodeve Pat. Cas. 321.
(4) 1 Web. Pat. Cas. 83, n.
(5) 1 Web. Pat. Cas. 77, 80.
(6) Holt N. P. C. 58.
(7) 2 B. & Ald. 345, 350.
(8) 13 Ch. D. 65; Goodeve Pat. Cas. 494.
(9) Law Rep. 1 H. L. 315.

July 26. LORD HALSBURY L.C. :—

My Lords, this is an action for the infringement of a patent obtained in 1878. The patent is for improvements in the production of colouring matters suitable for dyeing and printing.

The specification describes the invention as consisting in the production of red and brown colouring matters which in chemical language may be termed the sulpho-acids of oxyazo-naphthaline. Now, before dealing with objections which involve a more minute examination of the specification and the directions therein given for the production of the newly invented colouring matters, there are two objections which admit of a more general treatment, and if sustained would establish principles of far wider application than the particular case under discussion would appear to require for its determination.

The objections I refer to are that the thing alleged to be invented is not new, and that at all events the invention is not useful.

Now as to the first, it would be almost sufficient to say that as a question of fact the objection is disproved. No one pretends that they ever saw or heard of the sulpho-acids of oxyazo-napthaline before the date of the patent. It has indeed been faintly suggested that in one of the formulas published in the Berichte der Deutschen Chemischen Gesellschaft it had been all but anticipated, but not even in that case was it said that the exact chemical combination had been discovered, much less that it was produced by the patented methods. The chief reliance was placed upon an argument as new as it is unsound and for which I think there is not the least judicial authority.

The argument may be stated thus;—This thing is not new because things of the same sort in analogous chemical relations had been discovered; people ought to have discovered it or were on the brink of discovering it; therefore this true and first inventor only completed by one step the route to which chemical discoveries had been tending without his aid. Such a principle applied to Patent Law would be fatal to the rights of all inventors, and is, as I believe, as inconsistent with that branch of our jurisprudence as it is destitute of judicial authority and contrary to the interests of scientific research. The lid of the

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historical kettle shewed the mechanical power of steam; the action of light on the salts of silver was widely known; and both these things in one sense were steps which led up to the discoveries which they brought in their train; but nevertheless many true and first inventors proceeded to utilise their steps by further development into inventions which certainly have not been challenged upon the ground now contended for.

I entertain no doubt that Dr. Caro's discovery is new.

But it is said secondly that it is not useful, and there is certainly authority for saying that an invention must be useful although that word is not found in the Statute. But when we examine the facts of this case I fear what I am about to say upon that subject may be open to the criticism that the facts render it unnecessary for your Lordships to express any opinion upon the subject. Every judge who has dealt with the question has decided that Messrs. Levinstein have infringed the plaintiffs' patent, and Messrs. Levinstein have manufactured and sold very large quantities of the product by the use of the plaintiffs' patented process. It cannot therefore be denied that to a considerable extent, and conspicuously as to the process No. 3, what I am about to say is not necessary to the decision of this case; but it is obvious that utility admits of degrees. Baron Alderson once said if it was of *any* use to the public a new invention could not be said to be void for want of utility, and an admitted contribution to the useful arts of a new product can hardly be said to be of no use. I think what is so often referred to in Patent Cases as a laboratory experiment and as not admitting of the quality of utility is intended to be applied to cases where really there is no product at all. Such an experiment proves the possibility of a product but does not really practically produce one in such quantities and under such circumstances as really to make it a product at all. The element of commercial pecuniary success has, as it appears to me, no relation to the question of utility in Patent Law generally, though of course where the question is of improvement by reason of cheaper production such a consideration is of the very essence of the patent itself, and the thing claimed has not really been invented unless that condition is fulfilled.

For the reasons I have given I do not propose to pursue this

subject further, but I will only add that if in considering generally the requirement of utility there is an obligation to make it clear that the patent will be commercially successful and so profitable to the patentee, the burden is so great that no patentee could discharge it.

But by far the most formidable objections are those which relate to the specification itself. The specification is said not to give sufficient information to enable the operator to obtain the result without fresh experiment and research. If this were true the patent would undoubtedly be bad; but this is in a great measure a question of fact, and Pearson J., a most careful and competent judge, heard the witnesses and gave credit to those who, on the part of the plaintiffs, proved that in the hands of a reasonably competent workman acquainted with the dyeing industry the specification is sufficient to enable him to procure the result. Apart from the finding of Pearson J., to which I certainly should attach a very high value, I cannot forbear from remembering the difficulty that some of the witnesses for the defence had in answering the question as to the sufficiency of the specification. More than once the question put as to a competent workman possessed of knowledge in the particular industry was answered by a reply about an "ordinary workman" without the essential words "possessed of knowledge in the particular industry." I gather from this that the witnesses for the defence shrank from saying that to persons acquainted with the business the specification was not sufficient. They did indeed contend that not only was it not sufficient but that if followed it was destructive to the intended result, but upon that subject I content myself with saying that I think they were thoroughly beaten. They chose their own battle ground: they declared that if the example they selected was followed the product was either actually destroyed or so changed as to be practically useless; and, in the conflict of evidence thus produced, one side contending that the directions were perfectly plain and sufficient, the other side contending that if followed they were not merely useless but would certainly end in failure,—in this conflict Pearson J. obtained the assistance of Sir Henry Roscoe, and I am satisfied by the report of that distinguished expert that the

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process which was described as impracticable and full of danger was neither the one nor the other: and I further agree that that issue being found for the plaintiffs reflects some light upon the evidence of the witnesses for the defence in matters which were not brought to the test by Professor Sir Henry Roscoe by actual experiment, as was the first process described by the patentee. Without therefore going into the detail of the evidence, and so far as the specification raises questions of fact, I find the facts as they were found by Pearson J.

But there remain two other questions, one of which is a question of nomenclature, to be in turn determined as a question of fact. One of the ingredients essential for the manufacture of the new product is naphthylamine, and it is said that the specification is uncertain and misleading because it uses the word naphthylamine without distinguishing the word into its two varieties, which chemical discovery has revealed and which later discovery has distinguished as alpha and beta naphthylamine. I say later discovery, because though beta naphthylamine was discovered in 1875, and this patent is in 1878, yet there is an answer of the principal witness for the defence which seems to me to dispose of the objection. Dr. Wright says in terms (Question 3021), that if in the year 1878 any competent chemist had been directed to use beta naphthylamine he would specially have described it as a *new* naphthylamine; and Bowen and Fry L.JJ. say that *no doubt it is probable that any dealer* in the article at the date of the patent would have understood by the word "naphthylamine" the older form. It appears to me that the answer I have quoted and the portion of the judgment I have read leave no doubt that by the ordinary reader, the competent and intelligent workman familiar with the subject, not the least doubt would be entertained as to what was the article referred to in the specification, when it was described simply as "naphthylamine."

There remains however the objection which as I understand it is the basis of the judgment of the majority of the Court of Appeal. The sulpho-acids (in the plural) of oxyazo-naphthaline are claimed by the patentee. All the sulpho-acids of oxyazo-naphthaline, so far as they are obtainable by the patentee's process, are claimed. As I have said, I find as a fact that the

evidence for the plaintiffs can be relied on and that the four processes do in fact produce sulpho-acids of oxyazo-naphthaline applicable to dyeing and printing which vary in colour but within the limits of brown and red.

If I understand the objection made in the judgment upon which I am commenting it is of this character: The patentee has not selected out of all he has claimed the best colour or shade of colour—he has claimed all, and only one is proved to have any practical value, and he has given no specific directions how to produce that particular shade of colour which is practically of value. In a certain sense the objection is well founded in fact: the patentee has, I think, claimed all the shades from red to brown, but I am at a loss to understand what is meant by the best colour. I do not know that there is any standard to which you can refer the goodness of a dyeing stuff in respect of its shade. Its tinctorial power, its temporary popularity, its brilliancy, are all qualities which may make it best under some circumstances, but which under others may make it less profitable, less popular, and therefore less commercially valuable. Each season very often has its own fashionable colour, and if to make the patent valid the patentee must foresee and describe a colour (by specimen I presume, since no nomenclature with which I am acquainted can distinguish minute shades of colour), then no patent could be valid for dye stuffs which should embrace a wide range of colours unless the patentee did that which nothing but the gift of prophecy could enable him to accomplish. Of course if the specification were misleading, if it were to describe a process by which it was alleged that you could produce a red colour whereas in fact you produced a brown, I should agree that the patent would be bad; but, as I have already said, the words by which we signify the shades of colour are but imperfect instruments for representing the optical phenomena which we recognise under the generic name of colours.

It would of course be possible to give specimens of colour though not possible by verbal description. Your Lordships have been familiar, I dare say, with some of the specimens which have been provided for the purpose of distinguishing different shades of silks or worsteds, and if in addition to giving specimens of each,

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which of course would be possible, the duty were thrown upon the patentee that in order to make his patent valid each and all of those shades of colour should be separately distinguished as of greater or less commercial value, and that the specific mode by which each particular shade was to be distinguished should be described, it would appear to me to reduce the whole law upon this subject to an absurdity. Upon the principle contended for each shade must not only be shewn but its excellence or popularity must be distinguished separately by the patentee. This, as it appears to me, reduces the obligation supposed to press upon the patentee to an absurdity.

I am therefore of opinion that every objection to this patent has failed, and I move your Lordships that the order of the Court of Appeal be reversed, that the order of Pearson J. be restored, and that the respondents do pay to the appellants the costs both here and below, and that the cross appeal be dismissed with costs.

LORD HERSCHELL :—

My Lords, the Badische Anilin und Soda Fabrik, the plaintiffs in this action, sued Levinstein and Co. the defendants, in respect of the infringement of a patent, of which the plaintiffs were the owners. There is a cross appeal between the same parties before your Lordships' House, but I will, for convenience sake, hereafter call the Badische Anilin und Soda Fabrik "the appellants," and Levinstein and Co. "the respondents."

The respondents by their statement of defence denied that they had infringed the appellants' patent, and impeached its validity on three grounds: 1st, that the invention was not new; 2ndly, that it was not useful; and 3rdly, that the specification did not sufficiently ascertain and describe the nature of the invention. The action was tried before Pearson J., who decided all these points in favour of the appellants. In the Court of Appeal the learned Lords Justices were divided in opinion. Baggallay L.J. agreed with Pearson J., but the majority, Fry and Bowen L.JJ., being of opinion that the patent was not valid, the judgment for the plaintiffs was reversed, and judgment entered for the defendants. Hence the present appeal.

The letters patent alleged to have been infringed were granted to J. H. Johnson, as for a communication from abroad by Heinrich Caro. The provisional specification bore date the 25th of February 1878, the complete the 23rd of August 1878.

The title of the patent is "Improvements in the production of colouring matters suitable for dyeing and printing." The specification concludes with two claims: the first, which is the more important, being in these terms,—"First, the production of red and brown colouring matters, which, in chemical language, may be termed the sulpho-acids of oxyazo-naphthaline by the action of the diazo compounds which may be prepared from naphthylamine or from the sulpho-acids of naphthylamine upon any of the isomeric naphthols, or of mixtures of the same, or upon any of the sulpho-acids which may be prepared from either alpha naphthol, or from beta naphthol, or from mixtures of the same, substantially by the process above described."

I shall confine my observations, in the first instance, to the invention described in this claim, reserving until afterwards what I have to say about the second claim.

I may observe, at the outset, that I think it is established that the chemical compounds, termed sulpho-acids of oxyazo-naphthaline, were not known at the time the patent was taken out. I shall have again to advert to this point hereafter; but I state it now, because it has an important bearing upon the question to which I am about to address myself, viz., what is the invention which the patentee claims by his specification?

The determination of this question, which presents itself at the very threshold of the inquiry upon which we are engaged, appears to me, I confess, free from serious difficulty. Fry L.J. in delivering the judgment of the majority of the Court of Appeal, complained that the course pursued by the appellants had made it very difficult to answer this question, as they did not put into the witness-box Dr. Caro, or any other witness, to prove what the real invention was. I cannot think that this complaint was well founded. The question, what the real invention is, must be answered from a critical examination of the specification. Neither Dr. Caro, nor any other witness, could have been permitted to do more than to assist in its construction by

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bringing to the mind of the Court the state of chemical knowledge at the time the patent was granted, and this could be done by any competent chemist as well as by Dr. Caro. This, indeed, was the view taken by the respondents themselves, for when the appellants asked their consent to a postponement of the trial, because Dr. Caro would be unable to attend at the appointed time, on account of illness, the respondents refused the consent applied for, on the ground "that there could not be any material information within Dr. Caro's knowledge in support of the specification which could not be given equally well by any scientific chemist."

The difficulty in the construction of the claim arises from the fact that the term "sulpho-acid of oxyazo-naphthaline" does not describe a single chemical compound exhibiting under all circumstances uniform phenomena. It is equally applicable to many distinct isomers made up, indeed, of precisely the same chemical components, so far as chemical analysis reveals them, but possessing different properties and exhibiting varying phenomena.

In my opinion the specification must be construed as claiming all the different isomers described by the term sulpho-acids of oxyazo-naphthaline, which are red or brown colouring matters, and which are produced from the action of the diazo compounds prepared from naphthylamine or from the sulpho-acids of naphthylamine upon any of the isomeric naphthols, or upon any of the sulpho-acids which may be prepared from either alpha naphthol or beta naphthol, or from mixtures of the same.

The majority of the Court below did not indicate what was, in their view, the true construction of the claim. They considered that the appellants were in this dilemma: either, on the one hand, the specification claimed all the possible isomers of the sulpho-acids of oxyazo-naphthaline, in which case, as they were by no means all of use as dyes, and, so far as was shewn, only the one isomer, used alike by the appellants and respondents, was of any practical value, the patent was bad for want of utility; or, on the other hand, the invention was the production of this particular isomer, in which case the patent was bad, because the specification did not particularly ascertain and describe the means of producing it.

I have already stated that I think the claim was the more extended one. I proceed next to inquire whether, upon this assumption, the patent is bad for want of utility.

I will assume for the present that all the isomeric sulpho-acids of oxyazo-naphthaline, arrived at by the process described in the claim, produce red or brown colouring matters which may be used for dyeing. There can be no doubt that the different isomers so produced are colouring matters of varying shades of red and brown. And the specification undoubtedly does not point out what particular shade of either colour will be produced by any one of the alternative processes suggested, nor does it indicate which will be of the greatest practical value, either by reason of the colour it produces being one likely to be in demand, or from the greater economy in the cost of its production.

If the failure thus to discriminate between the several isomers invalidates the patent, the judgment of the Court of Appeal is not open to question. But I may observe, at the outset, that to require the patentee thus to discriminate, would, as it seems to me, be to insist upon what is really impracticable. Fry L.J. says it may be done when the isomers have no separate nomenclature, by a reference to the differentia of each isomer. But how is such a reference practicable when the only known differentia is, that it produces a particular shade of a particular colour? It is said that the patentee could at least have pointed out which process would produce the particular isomer, giving a bright red colour, which alone is shewn to have any commercial value. This indicates the fallacy which, I think, underlies the judgment pronounced by Fry L.J. I do not think it is a correct test of utility to inquire, whether the invented product was at the time of the patent likely to be in commercial demand, or capable of being produced at a cost, which would make it a profitable speculation to manufacture it. The demand for a particular colour depends upon changing fashion and passing moods of fancy. The one which to-day may be in large demand may to-morrow be a drug in the market. Again, a process which at one time could not be worked at a profit on account of the expense of the materials employed may shortly afterwards be so worked by reason of a diminution in the cost of these materials.

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Is the person who patents such a process to be deprived of all benefit of his invention when it becomes a commercial success, because at the time the patent was granted it could not be worked to a profit? The learned counsel for the respondents were asked for any authority in support of the view taken by the majority of the Court of Appeal on the question of utility. They were able to produce none. There are abundant perils already in the path of every inventor, and I am not disposed to add to their number unless compelled to do so.

In the present case the products which result from the appellants' process are no doubt of varying worth, but one at least has proved to be of great commercial value, and it is not shewn that any of them are incapable of being used effectually for the purpose of dyeing. The invention of a process resulting in new products which may thus serve a useful purpose possesses in my judgment the requisite predicate of utility. And there is, I think, no obligation on the inventor in such a case as this to indicate the respective advantages for dyeing purposes of the different shades of colour produced.

It was urged by the learned counsel for the respondents that a patentee is bound to disclose the means by which his invention may be carried into effect, and that if he leaves this to be ascertained by experiments, his patent cannot be supported. This is no doubt correct. But I think the patent under consideration does shew how the colouring matters are to be produced, and that what it leaves a skilled person, of the class to whom the specification is addressed, to discover is only which of these colouring matters will best answer his purpose at any particular time. There is, in my opinion, no warrant for asserting that this invalidates the patent. I may add that the evidence satisfies me that when once the desired shade is obtained there would be no practical difficulty in repeating the process with a reasonable certainty of producing the same result.

One other argument I ought to notice before leaving this part of the case. The respondents insisted that the specification not merely fails to point out how the most useful isomer, viz., that which produces the brilliant red dye, is to be obtained, but that it employs language calculated to warn anyone studying it

against adopting the means by which alone that result could be attained. This would be a serious matter if it were established, but I cannot see that it is. The point arises on the third of the processes described in the specification. After describing three modes of producing the sulpho-acids of naphthylamine, the specification proceeds: "By the said methods, as is well known, several modifications of the sulpho-acids of naphthylamine are obtained, chiefly differing from each other by their various degrees of solubility in water, some of them being nearly insoluble, such as the so-called naphthionic acid." This insoluble form of the sulpho-acids produces, it is said, the best result. Be it so. I can find nothing to warn the reader of the specification against its use, especially as the description of the third process ends with the distinct statement that *all* the modifications of the sulpho-acids of naphthylamine may be converted into the corresponding sulpho-acids of oxyazo-naphthaline in the manner described, and thus colours obtained differing in a similar ratio in their various degrees of solubility. But it is further said that the mode in which a reader of the specification is told to convert the sulpho-acids into their respective diazo compounds, is applicable only to the soluble sulpho-acids, and therefore necessarily excludes the use of the insoluble forms. To render this contention intelligible it is necessary to quote the exact words used. "The sulpho-acids of naphthylamine are converted into their respective diazo compounds, and equal molecules of the diazo compounds thus obtained, and of either alpha naphthol or beta naphthol are allowed to re-act upon each other by preference in an alkaline solution, and substantially in the manner above described in the first and second processes."

It is contended that these concluding words apply to the whole of the preceding description, and, therefore, incorporate the mode by which, under the first process detailed in the specification, naphthylamine is converted into its diazo compound. I am by no means sure that this contention is well founded, but I will assume it to be so. Turning then to the first process, I find all that is stated is that the naphthylamine is converted into its diazo compound by the action of nitrous acid in a manner well known to chemists.

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Now it is proved that at the date of the patent a method (called Cleve's) of effecting the conversion of naphthionic acid into its diazo compound had been made public. Indeed it is relied on by the respondents in their alleged anticipations of the appellants' patent. Much stress, however, was laid on the example which follows the general statement I have quoted. It was pointed out that the result of the conversion of the naphthylamine into its diazo compound is spoken of as a "solution," and this, it was argued, would be inapplicable where an insoluble sulpho-acid was converted into its diazo compound. I observe, however, that the direction for the preparation of the diazo compound of the naphthylamine is *to mix* or dissolve it. And I think that the word "solution," may without violence, be applied to a liquid having fine particles suspended in it. I see no reason to believe that a person of ordinary skill reading the specification would have any difficulty in converting an insoluble sulpho-acid into its diazo compound, or that it would ever occur to him that he was warned against it. It strikes me that if he had to deal with an insoluble material, the first idea that would suggest itself would be to turn it into a very fine powder before putting it into the liquid, and so to make the condition approach as nearly that of a solution as possible. I am confirmed in these views by the fact that Dr. Dewar took this very step, as a matter of course, when carrying out this part of the third process.

I started with the assumption that all the sulpho-acids of oxyazo-naphthaline produced by the patented process would be red or brown colouring matters. This assumption is warranted by the evidence, because, although it was stated that there are sulpho-acids of oxyazo-naphthaline which produce neither of these colours, it was not shewn that these acids resulted from any of the processes described in the patent.

I pass to the question of novelty, upon which I need not pause long. Dr. Wright, a chemist of skill and knowledge, called for the respondents, admits that prior to the patent he never knew of a sulpho-acid of oxyazo-naphthaline being produced. Mr. Levinstein's evidence is to the same effect. It is clear to my mind, that he was led to operate with these materials by the

information derived from the appellants' patent. It is suggested that even though the particular substance was unknown, similar bodies arrived at by similar processes were well known, and that chemical analogy would at once indicate the supposed invention. A complete answer is given to this argument by Dr. Griess, one of the highest authorities on this branch of chemistry. He says: "In 1864, I distinctly state that by the combination of diazobenzol and phenol dye was obtained, and if I had been a little cleverer, analogy would have induced me to prepare this very dye which is now under consideration. But analogy did not lead me to do that; analogy does not go a long way in chemistry."

Having arrived at the conclusion that the issues of want of novelty and utility must be determined in favour of the appellants, there still remains the important question whether the specification sufficiently ascertains and describes the nature of the invention. The specification has been subjected to a most searching criticism in the able argument of the counsel for the respondents, and many objections have been taken to it. One of these applies to all the four processes described by the specification, the rest relate specifically to one or other of these processes. I will deal first with the former.

The objection is that whilst the specification throughout speaks simply of naphthylamine without any prefix, there were, at the date of the patent, two known isomers called alpha and beta naphthylamine, and that the specification is, on this account, ambiguous. In weighing the objection it is necessary to bear in mind the facts relating to these two isomers. Alpha naphthylamine had been well known for at least fifteen years prior to the patent. Beta naphthylamine was first discovered in 1875, and down to 1878 was only known by the record of laboratory experiments, and had not become an article of manufacture. Until after the discovery of beta naphthylamine, alpha naphthylamine was described simply as "naphthylamine." I will not go into the details of the evidence on this point, but will state the conclusions I draw from it. I am satisfied that after 1875, and down to the time of the patent, alpha naphthylamine was still sometimes spoken of as "naphthylamine," and that if anyone had

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ordered "naphthylamine" of a manufacturer he would without hesitation have supplied alpha naphthylamine. Under these circumstances I entertain no doubt that any reader of the specification would understand by the word "naphthylamine" occurring in it, the known commercial article which until recently, at all events, had always borne that name, and not beta naphthylamine, to which the term "naphthylamine" alone had never been applied. I am therefore of opinion that the specification is not in this respect open to the charge of ambiguity.

The first process is impeached on more than one ground. First, it is said that the statement that the azo compounds are converted into their sulpho-acids, "by any method now in use for the preparation of organic sulpho-acids, such as, for instance, by heating them with fuming sulphuric acid," is misleading, inasmuch as there were methods in use for the preparation of sulpho-acids which would not be effectual in the case of these azo compounds. It seems to be common ground that although theoretically the sulphuric acid might be introduced by introducing chlorine and bromine, and then heating the body with a solution of sulphite of potash, yet for manufacturing purposes the only method employed would be the direct action of sulphuric acid. The objection taken is that some organic sulpho-acids can be prepared by the use of ordinary sulphuric acid, and at a temperature below 100° C., whilst this strength of sulphuric acid at this temperature would not be sufficient for the conversion of the oxyazo-naphthaline into sulpho-acids. I cannot regard the use of each varying strength of sulphuric acid and degree of temperature as a different method. And I think it would be an unreasonable construction of the language of the specification to treat it as an assertion that every degree of strength of sulphuric acid and of temperature which would suffice for the preparation of any organic sulpho-acid would convert these azo compounds into their sulpho-acids.

The next objection is, that although the first process might succeed on a small scale as a laboratory experiment, yet to attempt it on a large scale would be unsafe, and that it is, in truth, not practicable. To assist the Court upon this question certain experiments were directed to be made by Sir Henry

Roscoe. I have carefully considered the report of this eminent chemist in connection with the whole of the evidence given at the trial. In the result, no doubt is left upon my mind that this objection is untenable.

The second process is attacked on the ground that it states that the sulpho-acids produced by it result in red colours only, whereas, in fact, in this, as in the other processes, the result is brown or red, according as alpha or beta naphthol is used. It is obvious, as several of the witnesses point out, that the various shades of red and brown run into one another, and might be differently described by different people. You might have a reddish brown or a brownish red which one person might call a brown and another a red, and opinions might differ greatly as to which was the proper designation. I think the evidence establishes that whilst the first and third processes give a very distinct brown when the alpha naphthol is used, exhibiting a marked contrast to the red produced by the use of beta naphthol, there is no such manifest contrast under the second process. And I do not think that in alleging that by his second process only reds result, the patentee has misled the public and vitiated his patent.

I come now to the third process. This process deals with the conversion of the sulpho-acids of naphthylamine into their diazo compounds, and thence into the sulpho-acids of oxyazo-naphthaline. The patentee makes no claim to the production of the sulpho-acids of naphthylamine as any part of his invention. He could not do so, for it was a substance well known when he applied for his patent. He so states in his description of the third process, and he details, moreover, as well known, three methods for its preparation. These had been made public by Schmitt and Schall, Piria, and Laurent, respectively. A considerable body of evidence was adduced as to the relative expense and advantages and practicability for manufacturing purposes of these different methods, which seems to me to be really beside the case. To say that sulpho-acids of naphthylamine were little known, and their manufacture difficult, appears to me wholly irrelevant. The patentee, when referring to a particular use of known substances, was not bound to enter upon any description

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of the manner in which they might be prepared, and his patent could not have been impeached had he been entirely silent with regard to it. It is said that the examples which he gives of the manner in which the sulpho-acids may be prepared are incorrect and misleading. The evidence does not satisfy me that they are so, nor is it clear to my mind that, even if they were, an error of this character would vitiate the patent.

The other arguments addressed to us with reference to the third process I have already observed upon in an earlier part of my opinion.

As to the fourth process, Fry L.J. says that there is no satisfactory evidence that it produces any good and valuable result. But it appears from the judgment of Pearson J. that both sides agreed that it must stand or fall by the other processes. I need not therefore delay your Lordships with any reference to it.

The same remark applies to the second claim with which the specification concludes. It appears to have been treated as depending on the same considerations as the first.

I do not think it necessary to add anything to what was said in the Courts below on the question of infringement. Upon this point all the Judges were agreed, and I entirely concur in their view.

Upon the whole then I have arrived at the conclusion that not one of the grounds upon which the patent is impeached has been sustained. I agree with Pearson J. that the idea was new and meritorious, that the processes were sufficiently described and could be carried into effect, not simply as laboratory experiments, but for commercial purposes.

It follows that, in my opinion, the judgment of the Court of Appeal entering judgment for the defendants in the action must be reversed and the judgment of Pearson J. restored.

I need say nothing about the cross appeal which related to the manner in which the costs were disposed of by the Court of Appeal, as this necessarily falls to the ground if the judgment of the Court of Appeal be reversed, and the respondents ordered, as I think they ought to be, to pay the costs in that Court; I think, too, the respondents must pay the costs of both appeals in this House.

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LORD MACNAGHTEN:—

My Lords, I only desire to express my concurrence in the conclusion at which both my noble and learned friends have arrived, and in the reasons they have given for it.

Order of the Court of Appeal reversed; order of Pearson J. restored; cross appeal dismissed, with costs; respondents in original appeal to pay to the appellants the costs both here and below. Cause remitted to the Chancery Division.

Lords' Journals 26th July 1887.

Solicitor for appellants: *J. Henry Johnson.*

Solicitors for respondents: *Gregory, Rowcliffes, & Co., for A. & G. W. Fox, Manchester.*

[HOUSE OF LORDS.]

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1887
Aug. 1.

JONATHAN INGHAM LEAROYD AND WILLIAM EDWIN CARTER . . . } APPELLANTS;

AND

ELIZABETH WHITELEY AND OTHERS . RESPONDENTS.

Trustee—Investment—Real Securities—Mortgage of Trade Premises—Brickfield—Valuation of Trade Premises—Interest.

Trustees invested trust money on the security of a 5 per cent. mortgage of a freehold brickfield, with buildings, machinery and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested and upon the supposition that the concern was going, but the report did not state this, nor distinguish between the value of the land and that of the buildings, machinery, &c. The trustees acted bonâ fide but acted upon the report without making any further inquiries. The security having failed:—

Held, affirming the decision of the Court of Appeal (33 Ch. D. 347), that the trustees had not acted with ordinary prudence, and were liable to make good the money with interest at 4 per cent. from the date of the last

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payment; and that the tenant for life was not liable to return to the trustees 1 per cent., which was claimed on the ground that the higher interest was due to its being a hazardous security.

APPEAL from a decision of the Court of Appeal (1).

The facts are fully set out in the report of the decision of Bacon V.C. (2). Briefly they were as follows:—

Benjamin Whiteley by his will in 1874 appointed the appellants, Learoyd an accountant, and Carter a schoolmaster, executors and trustees, and directed them to invest £5000 and pay the income to the respondent Elizabeth Whiteley during her life and after her death to hold the £5000 or the investments in trust for her children. The investment clause contained a power to invest "in or upon real securities in England or Wales." The testator died in 1876 and his will was proved by the appellants.

In January 1878 the appellants invested £3000, part of the £5000, together with £500 from another source, upon a 5 per cent. mortgage by Messrs. Barstow & Hartley of a freehold brickfield containing about ten acres with the buildings, machinery, brick and pipe kilns affixed to the soil, situate near Pontefract, Yorkshire, where the mortgagors then carried on their business of sanitary tube and fire-clay manufacturers. Before lending the money the appellants employed Messrs. Utley and Gray, local valuers of experience, to survey on their behalf. The valuers' report, made in October 1877, after describing the situation, works, machinery &c. and business then carried on, said "we are aware there should be a large margin in brickworks as the material is constantly being worked out, but having carefully considered this we think the land, premises and freehold fixtures form a good security for £3500." The report then stated that the mortgagors intended to lay out about £1700 in buildings and other improvements and added, "when these things are carried out the security would certainly be as good for £4500 as it is now for £3500."

The mortgagors paid the interest regularly till August 1884 when they failed, and the business ceased. In January 1884 they tried to sell the property by auction but failed, it being bought

(1) 33 Ch. D. 347. (2) 32 Ch. D. 196.

in at £3300. The respondents, Elizabeth Whiteley and her children, having brought an action against the appellants seeking to make them liable for an improper and unauthorized investment, at the trial before Bacon V.C. evidence was given for the plaintiffs by valuers who saw it in 1885, that the property was in 1878 probably worth about £2300, taken not as a going concern, and about £3200 as a going concern. For the defendants Mr. Utley who made the report in 1877 testified that he had then valued it for the purposes of the security at £7200 as a going concern, the land being valued at £2000; and his evidence was supported by other valuers.

Bacon V.C. held the trustees liable to make good the £3000 with interest at 4 per cent. from August 1884 (1), and this decision was affirmed by the Court of Appeal (Cotton, Lindley and Lopes L.JJ.) (2).

July 1, 5, 7. Sir *Horace Davey* Q.C. and *W. Baker* for the appellants:—

The ordinary rule as to investments—not an absolute one but such as the Courts will in the absence of special circumstances act on—is that trustees should not lend more than two-thirds of the value on freehold land, and one-half on land and buildings used in trade. The evidence establishes (and the Courts below so thought) that £7200 was the fair value of the property at the time of the investment. Was that a proper security, seeing that a trade was carried on? The rule of one-half allows for the fact of trade. If besides the margin of one-half a deduction is to be made for the value of the trade machinery, plant &c. the allowance is made twice over. That is the fallacy of the judgments below. Trustees are not expected to possess professional skill or knowledge: *Speight* v. *Gaunt* (3), per Jessel M.R. and the House of Lords. It is said that a trustee must exercise that prudence and care which a reasonably prudent and careful man would exercise in the management of his own affairs. Not a very satisfactory rule; a man is entitled to be imprudent in his own affairs. The only rule really is what the Courts think a prudent

(1) 32 Ch. D. 196.
(2) 33 Ch. D. 347.
(3) 22 Ch. D. 727, 739; 9 App. Cas. 1.

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trustee ought to do. If he chooses reasonably proper professional agents and honestly acts on their advice he is not liable: *Ex parte Belchier* (1). *Rowland* v. *Witherden* (2) and *Bostock* v. *Floyer* (3) do not contradict the principle contended for. *Stickney* v. *Sewell* (4), *Stretton* v. *Ashmall* (5), and *In re Olive* (6) are illustrations of the rule of practice as to an ordinary prudent man, where the trustees were held liable. So is *Oxley* v. *Scarth* (7) where they were exonerated. Lewin on Trusts (ed. 1885) p. 325 says that trustees would not in general be justified in lending so much as one-half on buildings used in trade, but the authorities cited do not bear out that proposition. *Royds* v. *Royds* (8) was a decision only as to costs. *Budge* v. *Gummow* (9) is clearly distinguishable. At all events the order as to the payment of interest is wrong: the appellants are liable only for the balance of interest at 4 per cent. from January, 1878, after giving credit for and deducting the interest actually paid by the appellants. The question does not affect the infant cestuis que trust, only the tenant for life, and she cannot both repudiate the mortgage and claim the interest paid under it.

Marten Q.C. and *A. N. Cumming* (*Seward Brice* Q.C. with them) for the respondents contended that the judgments below were right, distinguished the cases relied on contrà, and also referred to *Smethurst* v. *Hastings* (10).

Baker replied.

The House took time for consideration.

Aug. 1 LORD HALSBURY L.C.:—

My Lords, in this case trust funds have been lost by an investment on insufficient security.

Some doubt has been expressed as to whether Bacon V.C. did not intend to decide that the security upon which the money was invested was not a real security at all and therefore not

(1) Amb. 218.
(2) 3 Mac. & G. 568.
(3) 35 Beav. 603.
(4) 1 My. & Cr. 8.
(5) 3 Drew. 9.
(6) 34 Ch. D. 70.
(7) 51 L. T. (N.S.) 692.
(8) 14 Beav. 54.
(9) Law Rep. 7 Ch. 719.
(10) 30 Ch. D. 490.

within the powers of the trustees. In my opinion Bacon V.C. did not intend so to decide: what he said was—what I think is accurate—that although the ten acres of land upon which this money was invested was in a certain sense real security because it was land, the substantial value upon which the money was advanced was a brickmaking concern. The trade has ceased to exist and the substantial part of the security, which represented £3500 or £3000—for I do not think it is material to consider the question of £500—has ceased to exist.

No one either at the Bar or in either of the Courts in which this matter has been litigated has doubted that the trustees intended to do what was right, and no imputation can certainly be made against them that they were actuated by any other motive than that of procuring the highest amount of interest that they could for their cestui que trust. But the goodness of their motives cannot justify the propriety of the investment. A trustee must use ordinary care and caution, and although it is impossible to lay down an absolute rule—and indeed it cannot be contended that the ordinary practice of Courts of Equity has the force of law—yet there are some limits beyond which it is manifest no trustee is authorized in going.

It is of course true that it is not because the money has been lost that the trustees are necessarily liable. But as the money has been lost by the insufficiency of the security it is necessary to see what precautions were taken by the trustees in conducting the business of the trust.

I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law, and in this case I do not deny that he would be entitled to rely on a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the trustee himself is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept

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that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence.

In applying the principles that I have indicated to this particular case it is obvious to remark that the trustees not only relied upon the skilled persons for the possession by those persons of skill in their own business, but appear to have adopted without sufficient care what those skilled persons said.

As to the propriety or impropriety of the investment looked at not merely as a question of value but as a question of the due performance of the trust, is it true to say the trustees have been misled by an erroneous statement as to what was the value of the land? I think not. I should think they might well be able to defend themselves from responsibility on the ground that they had selected a reasonably careful person and acted upon the skilled advice that they had received upon such a question—but that is what they did not do.

Assuming in their favour that they sufficiently understood and analysed the valuers' report—though I doubt whether that assumption is accurate—they acted on advice not that these ten acres of land were as land a sufficient security for the sum they invested, but whether they, the trustees, were justified in investing upon the security of a speculative trading adventure. The forming a judgment on such a question was the duty of the trustees themselves—a duty which they could not delegate to others.

I only wish to add that I am unable to follow or adopt some observations of the Court of Appeal which seem to point to a different degree of care in regard to the conduct of the business of a trust according to whether there are persons to take in the future, or whether the trust fund is to be created for one beneficiary absolutely. The question must be the due care of the capital sum. Whether that capital sum is one in which there is a life estate only, or absolutely for the use of the beneficiary, seems to me to bear no relation to the question of the due caution which a trustee is bound to exercise in respect of the investment of the trust fund.

I agree with Cotton L.J. that the tenant for life during the time the money was invested received the income she was

entitled to receive, and that the trustees were right in paying her the interest, as it was in truth and in fact the interest received from the trust fund whereof she was tenant for life. But it seems quite an untenable proposition to contend that she is therefore bound to bring into account the interest that she has received upon the investment, because that investment has turned out to be an insecure one and the trustees are called upon to make good the deficiency that has arisen.

I am of opinion that the judgment of the Court of Appeal was right, and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON :—

My Lords, I also am of opinion that the order of the Court of Appeal must be affirmed.

As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person sui juris dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character ; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply.

The Courts of Equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value ; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be

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in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that in cases where the subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure, until he has ascertained not only their present market price, but their intrinsic value, apart from those trading considerations which give them a speculative and it may be a temporary value.

Upon the general law applicable to this case I have only to observe further that whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt* (1), avail themselves of the services of others wherever such employment is according to the usual course of business. If they employ a person of competent skill to value a real security, they may, so long as they act in good faith, safely rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, and without forming, an opinion for themselves. At all events if they choose to place reliance upon his opinion without the means of testing its soundness they cannot, should the security prove defective, escape from personal liability, unless they prove that the security was such as would have been accepted by a trustee of ordinary prudence, fully informed of its character, and having in view the principles to which I have already adverted.

By the terms of Benjamin Whiteley's will his trustees are authorized to invest trust moneys upon real securities in England and Wales. It is not disputed that in lending £3500 upon the security of Barstow & Hartley's brickfield, in terms of the mortgage of the 12th of January 1878, the appellants acted in good faith. Of that sum £3000 only belonged to Whiteley's

(1) 9 App. Cas. 1.

trust, a circumstance which does not alter the character of the security, because it has not been shewn that the trust money was made a charge in priority to the balance of £500.

The course which was followed by the appellants in entering into the transaction of January 1878 is very compendiously stated by Mr. Learoyd, in whose evidence, so far as it related to matters within his personal knowledge, Mr. Carter generally concurred. In his examination in chief Mr. Learoyd was referred to a report by Messrs. Uttley & Gray, dated the 8th of October 1877, and interrogated: "(*Q.*) Did you and Mr. Carter on that report form an opinion that it was a proper security for the investment?—(*A.*) We did after further inquiries." Being interrogated in cross-examination: "(*Q.*) What other inquiries did you make about the brick properties?—(*A.*) I instructed our solicitor to make inquiries respecting the respectability of the parties."

It plainly appears from these answers that the appellants had no information regarding the subjects mortgaged except what was contained in the report of their valuators.

In my opinion the report of Uttley & Gray is not such a document as a lender of ordinary prudence would have ventured to act upon. It discloses the fact that there were only ten acres of land, and that a not inconsiderable portion of the subjects consisted of buildings and fixed machinery used for brick-making. But it does not state either the cumulo value of the subjects or the separate values of the land, the buildings, and the machinery. It does, no doubt, contain the statement that the valuators thought the land, premises, and freehold fixtures would afford good security for £3500; but trustees who choose to act upon such an opinion must take the risk of the security proving insufficient.

In these circumstances, I think it has been established that, at the time of taking the security, the appellants altogether failed to exercise that ordinary amount of care which the law required of them. Notwithstanding such failure, they would still have had a good answer to the respondents' claim had they been able to shew that if they had made full inquiries, and had

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obtained all necessary particulars from their valuators, they would have been justified as men of ordinary prudence in accepting the security. Unfortunately the evidence led by the appellants themselves appears to me to negative any inference of that kind. Their witness and valuator, Mr. Uttley, states that in 1877 he valued the subjects as a going brick-work at £7200, of which £2000 was for the land, and the remaining £5200 for buildings and machinery. He did not in 1877 form any estimate of their value upon a sale by the mortgagees, and not as a going concern. Being asked on cross-examination what difference that would have made on his estimate he said, "I should say 10 per cent. would represent the difference not as a going concern. Everything was in order." The answer is by no means satisfactory. It assumes that the works would be kept in the same good order; and it leaves out of account the possibility of depression in the brick-making trade, a factor which I do not think a prudent valuator would omit from his calculations. But, taking his estimate as he gave it, a deduction of 10 per cent. leaves a margin of £520 below the minimum amount which ought to be allowed in order to cover the possible depreciation of subjects affected, to the extent of five-sevenths of their value, by the fluctuations of trade.

Upon the question of interest I agree with the reasoning of Cotton L.J. I do not think the tenant for life can now be required to repay or give credit for any part of the sums paid to her before August 1884, as the actual income of the trust estate.

LORD FITZGERALD:—

My Lords, I concur with my noble and learned friends in opinion that the decision of the Court of Appeal should be affirmed.

There was no controversy in the Court below or at your Lordships' Bar as to the rule which in such a case as the present governs the duties and liabilities of trustees, and I am satisfied to accept in substance the exposition of Cotton L.J. at p. 350, of 33 Ch. D., though it may be open to some verbal criticism.

The rest of the case relates to the proper view of the facts, and I am compelled to take the same view as my noble and learned friends, viz., that the trustees did not exercise ordinary care in investing the money intrusted to them. They invested the trust fund on a very insufficient security and without due or proper inquiry. It may well be described as a loan on a security the sufficiency of which depended on the prosperity of a hazardous manufacture carried on by the mortgagors on the mortgaged premises.

I concur with my noble and learned friends in affirming the decision of the Court of Appeal. I do so with that regret which the judge feels in every case where his decision fixes liability on trustees who have acted honestly but erroneously and to some extent negligently in not requiring more full and precise information than they received from the valuators they employed. In my opinion the trustees in selecting and adopting the security in question did not exercise the care or foresight which a man of ordinary prudence ought to exercise and would probably exercise in making such an investment. I am not disposed however to say that the fact that the investment was one for the benefit of the tenant for life and after her decease then for her children, is to be entirely left out of consideration. It was not to be a temporary investment but one to last for many years if not called in or paid off.

Lopes, L.J., thus accurately describes the security which the trustees accepted: "Its value mainly depends on the success of a speculative and fluctuating business, a business for which it is difficult to find customers" (i.e. purchasers), "a business largely dependent on the energy and solvency of those working it,—a business of necessity of precarious duration, and which cannot be carried on without such an excavation and destruction of the soil as must eventually leave what remains nearly useless for agricultural and other purposes;" and, I may add, a security of a peculiarly hazardous character, and in reference to which it has been properly observed that the value of the buildings and fixed machinery depended entirely on the mortgagees being able to find a purchaser for it as a going concern for the manufacture of bricks.

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Upon the minor point in the case I also concur with my noble and learned friends.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 1st Aug. 1887.

Solicitors for appellants: *Godfrey, Rhodes, & Co., for Godfrey, Rhodes, & Evans, Halifax.*

Solicitors for respondents: *Jackson & Co., for Jackson & Jackson, Middlesborough.*

[HOUSE OF LORDS.]

H. L. (E.) 1887 — *May* 3, 5, 6, 10; *June* 13, 14, 16, 17, 23; *July* 29; *Aug.* 1, 2, 5.

EAST AND WEST INDIA DOCK COMPANY . . . . . } APPELLANTS;

AND

KIRK AND RANDALL . . . . . RESPONDENTS.

Arbitration—Reference—Jurisdiction of Arbitrator—Mistake of Arbitrator in Law—Revocation of Submission—Jurisdiction of Court to give Leave to revoke Submission—3 & 4 Will. 4 c. 42 s. 39.

Matters in difference which arose in the execution of a contract were referred to an arbitrator in accordance with a clause in the contract. The arbitrator received evidence which was objected to as tending to vary a contract in writing, and other evidence which was inadmissible in one view of the contract and admissible in another. The party who objected to the evidence having moved the Court under 3 & 4 Will. 4 c. 42 s. 39 for leave to revoke the submission:—

Held, reversing the decisions of the Court of Appeal and the Divisional Court, that the Court had power to give leave to revoke the submission where it appeared that the arbitrator was going wrong in point of law even in a matter within his jurisdiction; and that this power would be exercised unless the parties agreed to the arbitrator raising the questions in a special case for the opinion of the Court.

IN 1882 Messrs. Kirk & Randall entered into a contract with the East and West India Dock Company for the excavation and construction up to quay-level of new docks at Tilbury upon the marshes on the north side of the River Thames. A schedule of prices was attached to the contract, fixing the rates at which the quantities of work actually executed were to be paid for.

Clause 34 of the contract provided that if any dispute or dif-

ference should arise between the parties as to the meaning of the contract, or anything to be done thereunder, the matter in difference should be referred to the arbitration of some person to be appointed by the President of the Institute of Civil Engineers; that the reference and award should have all the incidents and consequences of a reference to and award by a sole arbitrator appointed under the Common Law Procedure Act 1854; and that the submission might be made a rule of the High Court.

In July 1884 disputes arose between the contractors and the company, the contractors claiming that they had not received sufficient payments, and they sent in to the company a claim for £256,660 in excess of the payments they had received, which amounted to £309,000, and demanded arbitration. They at the same time dismissed a large number of men engaged on the work. The company thereupon gave to the contractors notice to proceed with the works, and ultimately took them out of the contractors' hands, and the docks were afterwards completed by other contractors.

Sir Frederick Bramwell was duly appointed arbitrator. By several submissions (which might be made rules of Court) certain matters in difference were referred to him, of which the principal were, whether or not the contractors had been paid what was due, or if not, what sum was due; and whether or not the company were justified in taking possession of the works and ejecting the contractors.

The arbitration began in October 1884, and the counsel for the contractors contended that the contractors were entitled in respect of a great part of the work done to prices other than the prices specified in the schedule attached to the contract, on the ground that the work done by the contractors was not the work priced in the schedule, but was in fact "other description of work" within a clause in the specification, for which it was contended the arbitrator had jurisdiction under the contract to fix fair prices. In support of this contention the contractors tendered in evidence a section of eight borings seen by the contractors in the engineer's office, but not forming part of the contract drawings at the time of the tender. It was alleged on

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the part of the contractors that the description of certain strata as "clay" in the section of borings was inaccurate and misleading, the soil being, as they alleged, in fact mud, a far more expensive material to work in, and also that the section of borings shewed the ballast or soil fit for foundations at depths which, though accurate as far as they went, ought to have been supplemented by other information in the possession of the engineer, which would have shewn that in other parts of the work the ballast lay at greater depths, and consequently that the work would be of a far more difficult and expensive character. Similar objections were made to the evidence being given of other communications alleged to have been made by the engineer to the contractors before the date of the contract. The contractors also complained that the contract drawings shewed slopes at an inclination of $1\frac{1}{2}$ to 1, and alleged that the character of the material on the site was such, in fact, that it would not stand at anything like that inclination, but slipped down unless formed to a very much flatter slope.

The company, while denying that any inaccurate or incomplete information had, in fact, been given to the contractors, objected to the admissibility in evidence of the section of borings and other communications between the engineer and the contractors, on the ground that the rights and obligations of the parties were contained in the written contract, and that the prices scheduled to the contract could not be affected by the alleged fact (which was denied) that the soil or the depth of the work proved to be of an unexpected character. At the close of the contractors' case, which lasted sixty-seven days, counsel for the company were heard, and the arbitrator on the 9th of January 1886 delivered a written decision overruling the objections, and stating (inter alia) that he held the evidence in question to be relevant, and admissible as a necessary part of the narrative of the case, and as illustrating and identifying the subject-matter of the contract.

Sir Farrer Herschell January 22, 1886 obtained a rule to shew cause why the submissions to arbitration should not be revoked on the ground that the arbitrator had admitted evidence which was in point of law inadmissible, and exceeded his jurisdiction.

In moving for the rule, Sir F. Herschell cited as a precedent a decision by Blackburn, J., in *Hart* v. *Duke* (1).

The rule was granted by A. L. Smith and Grantham JJ., but discharged by Grove and Stephen JJ., whose decision was affirmed by the Court of Appeal (Lord Coleridge L.C.J. and Lindley and Lopes L.JJ.). The ground of the decisions in the Divisional Court and Court of Appeal was that the Court had no jurisdiction to interfere with a pending arbitration, unless it was shewn that the arbitrator was acting in excess of his jurisdiction; that in the present case the admissibility or otherwise of the evidence depended on the construction of the contract, which was for the arbitrator alone and the Court would not interfere.

Against these decisions the company now appealed.

May 3, 5, 6, 10. Sir *H. James* Q.C. and *Pollard* (*Kenelm E. Digby* and *G. St. John Mildmay* with them) for the appellants:—

The sole jurisdiction of the arbitrator is derived from the contract and the submissions; and the rights and obligations of the parties can be determined only by the submissions and the contract or by documents and drawings incorporated therewith. There was no express or implied warranty that the works described in the contract or shewn on the contract drawings were to be executed in any particular kind of soil. Upon such a contract there is no implied warranty: *Thorn* v. *Corporation of London* (2). The evidence admitted by the arbitrator was not admissible for the purpose stated by him or for any purpose within his jurisdiction.

Before 3 & 4 Wm. 4 c. 42 s. 39 a submission might be revoked by either party. Since that statute the leave of the Court is required, where the submission may be made a rule of Court, and leave will be given though the misconduct of the arbitrator be only legal and not moral. Supposing it should appear on the face of the award that the arbitrator had misconstrued the contract, the Court would set it aside: *Fuller* v. *Fenwick* (3); *Hodgkinson* v. *Fernie* (4); *Price* v. *Jones* (5); *Ames*

(1) 32 L. J. (Q.B.) 55.
(2) 1 App. Cas. 120.
(3) 3 C. B. 705.
(4) 3 C. B. (N.S.) 189.
(5) 2 Y. & J. 114.

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v. *Milward* (1); *Sharman* v. *Bell* (2); *Morgan* v. *Mather* (3); *Watson* on Arbitration (3rd ed.) p. 280. And so they will even if it appear not from the award but from another document: *Kent* v. *Elstob* (4). And if the Court can see that the arbitrator is going wrong in law they will interfere to prevent him: *Hart* v. *Duke* (5). The proper method is that adopted here—a motion to revoke the submission; and the Court will revoke where there is sufficient ground: *Faviell* v. *Eastern Counties Ry. Co.* (6); *Scott* v. *Van Sandau* (7); *Robinson* v. *Davies* (8). *Forwood* v. *Watney* (9) was relied on below, but was misunderstood. *Ching* v. *Ching* (10) relied on below, was doubted in *Kent* v. *Elstob* (4) and explained by Lord Eldon in *Young* v. *Walter* (11). The appellants seek only to revoke the submissions and reference to the arbitrator, and not to get rid of the contract or to revoke the general agreement to refer. The judgment of the Court of Appeal goes to this length—that if an arbitrator proposes to decide that the second and not the eldest son is heir-at-law the Courts will not interfere.

[They also referred to *Randell* v. *Thompson* (12); *Piercy* v. *Young* (13); *Fraser* v. *Ehrensperger* (14); *Steff* v. *Andrews* (15); *Chase* v. *Westmore* (16).]

May 10; June 13, 14, 16, 17, 23; July 29; Aug. 1. Sir *R. Webster* A.G. and *J. F. Moulton* Q.C. (*C. A. Cripps* and *Roger Wallace* with them) for the respondents:—

The evidence was admissible on some of the issues, and if admissible on any ground, whether that on which it was tendered or not, it is enough: *Irish Society* v. *Bishop of Derry* (17). But whether admissible or not depends on the construction of the contract, and that is for the arbitrator alone. The contract means what the arbitrator decides it to mean, even if he errs.

(1) 8 Taunt. 637, 641.
(2) 5 M. & S. 504.
(3) 2 Ves. jun. 15.
(4) 3 East, 18.
(5) 32 L J. (Q.B.) 55.
(6) 2 Ex. 344.
(7) 1 Q. B. 102.
(8) 5 Q. B. D. 26.
(9) 49 L. J. (Q.B.D.) 447.
(10) 6 Ves. 281.
(11) 9 Ves. 364.
(12) 1 Q. B. D. 748.
(13) 14 Ch. D. 200.
(14) 12 Q. B. D. 310.
(15) 2 Madd. 6.
(16) 13 East, 357.
(17) 12 Cl. & F. 641.

The true principle of a reference is this:—It is open to persons to agree that any dispute of any nature shall be submitted to any tribunal created by themselves for a limited purpose. This is clearly so as to any dispute of fact and the decision of such a tribunal is binding. There is no distinction in the nature of things between a dispute of fact and one of law; e. g. as to the meaning of a lease, or a question upon the Statute of Limitations. The tribunal must decide the points submitted and those only: must act impartially and honestly, and in that sense must decide according to law; but it is not essential to be free from error. No tribunal is. "No one is infallible, not even the youngest of us," said the late Master of Trinity (Thompson) to the assembled Fellows. The Courts have never substituted themselves for the arbitrator, wholly or partially. The arbitrator must conduct the trial fairly and do his best to decide according to law. If he deliberately decides—or says he will decide—contrary to what he knows to be the law the award can be set aside or the submission revoked; e.g. if he says he thinks the Statute of Limitations a bad law and means to disregard it. But if he honestly exercises his judicial mind and does his best his decision is final. To decide contrary to what the arbitrator knows to be the law would be in excess of jurisdiction. On this ground the party has the right to come to the Court and say "revoke the submission. I did not agree to this." As to the distinction between a dispute in fact and a dispute in law there has been some confusion. At one time the Courts held that though they could not interfere with error of law, yet they could with a mixed error of fact and law. That no doubt would now be held bad law, but it is not worse than some of the cases relied on contrà. The cases most relied on for the appellants are taken from that period of confusion; the early decisions, e.g. *Ching* v. *Ching* (1), were sounder than some of the later. *Hart* v. *Duke* (2) according to the argument contrà amounts to this—that an interlocutory demurrer can be brought whenever the arbitrator is going to make a mistake in law. But that case decides only that a decision though honest may be interfered with either because evidence is admitted which ought to have been rejected or rejected which ought to have been

(1) 6 Ves. 281. (2) 32 L. J. (Q.B.) 55.

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admitted. It is for the arbitrator and not the Court to decide whether the matter be within his jurisdiction: *Willesford* v. *Watson* (1). If the appellants' view be right no arbitrator will venture to express any opinion on any point in order to shorten the case, for fear the Court should revoke the submission. The arbitration clause in a contract cannot be revoked: *Piercy* v. *Young* (2). The decision of the arbitrator is absolutely final: *Forwood* v. *Watney* (3). [They also discussed the cases cited for the appellants.]

Aug. 1, 2. Sir *H. James* Q.C. in reply:—

True, the arbitration clause cannot be revoked, but the appointment of Sir F. Bramwell can. This rule asks for a revocation of the submissions. *Forwood* v. *Watney* (3) does not touch the present point. It was not suggested there that the arbitrators were about to err in law: but only that they were commercial men and not lawyers, and the Court held that they could not make a new contract, the parties having made one for themselves.

During the course of the argument Lord Halsbury L.C. said their Lordships had no doubt that they had jurisdiction to give leave to revoke the submissions if there was reasonable ground for supposing that the arbitrator was going wrong in point of law even in a matter within his jurisdiction, but they would hear the counsel for the respondents argue that point. At the close of the argument

The House took time for consideration.

Aug. 5. LORD HALSBURY L.C.:—

For obvious reasons their Lordships (3) do not desire to say anything which may prejudice either party in any contentions before the arbitrator, but they are of opinion that the arbitrator should state as part of and on the face of his award all the purposes for which and the effect, if any, which he has given to

(1) Law Rep. 8 Ch. 473.
(2) 14 Ch. D. 200.
(3) 49 L. J. (Q.B.D.) 447.
(4) The other noble and learned Lords were Lord Watson, Lord Fitz-Gerald, and Lord Macnaghten.

the five different classes of evidence specified in the paper handed in by Sir Henry James (1). The statement will be in the form of a special case under the Common Law Procedure Act 1854 s. 5. If therefore, before the morning of Tuesday next, Messrs. Kirk & Randall consent to an order being made to this effect, the rule herein will be discharged without costs on either side. If such consent is not given within the above time, the rule for leave to revoke the submissions herein will be made absolute.

Aug. 9. The parties having appeared at the Bar of the House by counsel and having intimated their consent the following order was made.

(1) *Order of the Court of Appeal and Order of the Queen's Bench Division reversed;* (2) *In respect of a consent having been given by the respondents to an Order being made as follows: Ordered, that the arbitrator in this matter do state, as part of and on the face of his awards in the form of a special case for the opinion of the Court, all the purposes for which he has received, and the effect, if any, which he has given to the five different classes of evidence specified in the five following paragraphs, namely:*

1. *Evidence as to representations made verbally and in writing, and by the borings, before the signing of the contract.*
2. *Evidence as to the nature of the soil.*
3. *Evidence as to the soil being different from that which can be inferred from the drawings, specifications, and schedule.*
4. *Evidence as to the extra depth of foundations.*
5. *Evidence as to the fair price to be paid for excavation, brickwork, &c.;*

(3) *In respect of such Order by consent: Ordered, that the rule nisi of the* 22*nd of January* 1886 *be, and the same is hereby discharged: that neither party*

(1) The 5 classes appear in the order stated below.

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have costs either in this House or in the Courts below: that the costs already paid by the appellants to the respondents under the Orders of the Court of Appeal and of the Queen's Bench Division be repaid by the respondents to the appellants: that the matter be remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals 9th Aug. 1887.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *Mackrell, Maton & Godlee.*

[HOUSE OF LORDS.]

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HENRY JOSEPH TOULMIN . . . . APPELLANT;

AND

CHARLES WILLIAM MILLAR . . . . RESPONDENT.

Practice—Appeal—New Trial—Jurisdiction of Court of Appeal to reverse a Verdict—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 4.

Quære, whether on an appeal from an order of a Divisional Court upon an application for a new trial, on the ground of the verdict being against evidence, the Court of Appeal has power under Order LVIII., rule 4, to give judgment for the party against whom a verdict and judgment have been given, instead of directing a new trial.

The decision of the Court of Appeal (17 Q. B. D. 603) upon this point doubted.

APPEAL from a decision of the Court of Appeal.

The action was brought by the respondent, a house and estate agent, against the appellant to recover commission upon the sale of an estate. At the trial before Lord Coleridge C.J. in November 1885 the jury found a verdict for the defendant, and judgment was entered for him.

The Queen's Bench Division (Manisty and Hawkins JJ.) ordered a new trial on the grounds of misdirection and of the verdict being contrary to the weight of evidence. The Court of Appeal (Lord Esher M.R. and Bowen and Fry, L.JJ.) held that

the verdict was against the weight of evidence, but, conceiving that they had the jurisdiction and that this was a proper case for its exercise, instead of ordering a new trial entered judgment for the plaintiff for £676 19*s.* 6*d.* under Order LVIII., rule 4 (1). Against this decision the defendant appealed.

July 7, 8, 12. *Arthur Charles* Q.C. and *A. Cock* Q.C. (*A. Beddall* with them) for the appellant, after contending that the verdict was right and that there was no misdirection, argued that the Court of Appeal had no power to reverse the verdict and enter judgment for the plaintiff under Order LVIII., rule 4, and referred to *Yorkshire Banking Co.* v. *Beatson* (2), *Hamilton* v. *Johnson* (3), *Williams* v. *Mercier* (4), and *Waddell* v. *Blockey* (5) decided under the repealed rule 10 of Order XL., which was in different terms.

July 14, 15. *Murphy* Q.C. and *C. Cagney* for the respondent, contended that the verdict was against the weight of evidence, that there had been a misdirection, and that the order of the Court of Appeal was right.

Cock Q.C. replied.

The House took time for consideration.

Aug. 9. LORD HALSBURY L.C. (after discussing the evidence and the direction of Lord Coleridge C.J. and coming to the conclusion that there had been no misdirection and that the verdict was right, proceeded as follows):—

My Lords, I only wish to add that if I entertained a different view of the facts, I should be unable to concur with the course pursued by the Court of Appeal. It becomes unnecessary in the view which I take to pronounce any absolute judgment in the matter, but I doubt very much whether Order LVIII., rule 4, gives any such jurisdiction as the Court of Appeal claimed to exercise in finding a verdict for themselves, and actually assessing damages

(1) 17 Q. B. D. 603.
(2) 5 C. P. D. 109, 127.
(3) 5 Q. B. D. 263.
(4) 9 Q. B. D. 337; affirmed H. L. 10 App. Cas. 1.
(5) 10 Ch. D. 416, 419.

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for breach of a contract. As I think the judgment of the Court of Appeal was wrong upon the facts it is not absolutely necessary to determine that question. As I think the Court of Appeal and the Divisional Court were wrong, I move your Lordships that the orders appealed from be reversed and the judgment of Lord Coleridge C.J. restored, and that the respondent do pay to the appellant the costs both here and below.

LORD WATSON and LORD FITZGERALD agreed with the Lord Chancellor as to the direction and the verdict and as to the motion before the House, but expressed no opinion upon the question under Order LVIII. rule 4.

Orders of the Court of Appeal and of the Queen's Bench Division reversed, with costs both here and below; judgment of Lord Coleridge C.J. for the defendant restored; cause remitted to the Queen's Bench Division.

Lords' Journals 9th Aug. 1887.

Solicitors for appellant: *Beal, Phillips, & Beal, for G. Carter Morrison, Reigate.*

Solicitors for respondent: *C. & S. Harrison & Co.*

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BANKRUPTCY—*Secured Creditor—Mortgage of Policy of Insurance—Covenant to pay Premiums—Proof of Debt—Valuing Security—Value of Covenant to pay Premiums—Proof in addition—Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 47.] The holder of a policy of insurance on his own life mortgaged it as security for a debt and covenanted with the mortgagees to pay the annual premiums. The mortgagor having become bankrupt the mortgagees valued the policy and proved in the Irish Court of Bankruptcy for the difference between that value and the debt, as provided by the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58):—*Held*, reversing the decision of the Irish Court of Appeal (*In re Killen*, Ir. Law Rep. 15 Ch. 388), that the mortgagees were not entitled under sect. 47 to prove in addition for the value of the covenant to pay premiums. DEERING *v.* BANK OF IRELAND - - 20

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BUILDING SOCIETY — *Rights of withdrawing Members—Depreciation of Assets—Resolution of Society to make Deduction from Amount at Credit of unadvanced Members—Invalidity.*] The rules of a benefit building society under the Building Societies Act, 1874, provided that the unadvanced members might withdraw the sum at their credit in the society's books after certain notice. The

BUILDING SOCIETY—*continued.*
society's property fell in value, and a majority of the members passed a resolution that 7*s.* 6*d.* per pound should be deducted from the amounts at the credit of the members and placed to a suspense account. No proceedings for winding up the society had been commenced; and there was no rule as to the manner in which losses were to be borne:—*Held*, reversing the judgment of the Court of Session, that the resolution was ultra vires; and that the members who had given notice of withdrawal after the resolution were entitled to be paid the whole amount at their credit. Auld *v.* Glasgow Working Men's Building Society - - - - 197

CANADA, LAW OF—*Dominion Act* 46 *Vict. c.* 24, *s.* 4—*Effect of Order of Railway Committee—Consolidated Railway Act*, 1879—*Right of Railway Company to commence Operations—Conditions precedent.*] *Held*, that an order of the railway committee under sect. 4 of the Dominion Act 46 Vict. c. 24, does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right:—*Held*, that such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and surveys" and "Lands and their valuation" which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act.—Where a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order:—*Held*, that it was not entitled to commence operations:—*Held*, further, that under the Act of 1879 the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals.—*Jones* v. *Stanstead Railway Company* (Law Rep. 4 P. C. 98) distinguished. Corporation of Parkdale *v.* West [602

2. —— *Ontario—Company—Sale by Director to Company—Ratification at General Meeting—Vendor's Right to vote as Shareholder.*] Where a voidable contract, fair in its terms and within the powers of the company, had been entered into by its directors with one of their number as sole vendor:—*Held*, that such vendor was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company. North-West Transportation Company *v.* Beatty - - - 589

3. —— *Quebec—Company—Transfer of Shares—Holder "in trust"—Notice—Liability of Transferee.*] A holder of shares "in trust" is not a mandataire prête-nom and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony, a transferee from such holder is bound

CANADA, LAW OF—*continued.*
to inquire whether the transfer is authorized by the nature of the trust. Bank of Montreal *v.* Sweeny - - - - - 617

4. —— *Quebec—Distribution of Legislative Powers—British North America Act*, 1867, *s.* 91, *cl.* 2, 3, 15, *s.* 92, *cl.* 2—*Direct Taxation.*] *Held*, that Quebec Act 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires of the provincial legislature.—A tax imposed upon banks which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of sect. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15, of sect. 91.—Similarly, with regard to insurance companies taxed in a sum specified by the Act. Bank of Toronto *v.* Lambe. Merchants' Bank of Canada *v.* Lambe. Canadian Bank of Commerce *v.* Lambe. North British Mercantile Insurance Company *v.* Lambe - - 575

5. —— *Quebec—Public Highways—*23 *Vict. c.* 72, *s.* 10, *sub-s.* 6.] By Canadian as by Scotch law when a street or road becomes a public highway, the soil of the road is vested in the Crown or other public trustee in trust for that public use.—Where a road or place in Montreal had been registered as a public place of the city under 23 Vict. c. 72, s. 10, sub-s. 6, and had been enjoyed by the public as a public way more than ten years before registration, and more than ten years after registration, and before suit:—*Held*, that, independently of the public right by common law (which had been established in the case), such place had become a public highway, and a private right to resume possession thereof could not be entertained. De la Chevrotière (Octave Chavigny) *v.* La Cité de Montréal - 149

6. —— *Quebec—Sale of Land—Quasi Contract—Civil Code, art.* 1041—*Commencement de Preuve.*] Where a landowner has empowered his agent to aliene, and such agent has without a completed contract to sell allowed an intending purchaser to take possession of a plot, effect substantial improvements in the reasonable expectation of obtaining a transfer on paying a proper price, and then transfer to the defendant, who in turn effected improvements:—*Held*, that such landowner has thereby laid himself under an obligation, such as in Civil Code, art. 1041, is called a quasi contract, to confirm the defendant's possession and title upon payment of the price thereof according to the rate ruling at the time of commencing the improvements with interest from that date.—Commencement de preuve must be some written evidence which lends probability to that which is sought to be proved by oral evidence. Price *v.* Neault - - - 110

CAPE OF GOOD HOPE—LAW OF—*Liability of Executors—Duty to convert within Six Months—Reasonable Discretion—Act XVII. of* 1875 *and Bye-laws thereunder—Right of any Beneficiary to Relief.*] An executor's discretion is not that of an absolute owner: it is limited by the duty of bringing the assets into a proper state of invest-

CAPE OF GOOD HOPE—LAW OF—*continued.*
ment within a reasonable time; the onus is upon him to shew that he has acted bonâ fide and has exercised a reasonable discretion.—Where the testator's assets were subject to trusts in favour of unborn persons and consisted in part of shares with unlimited liability, and the executors delayed conversion after the same was demanded by those beneficially interested:—*Held*, that they were liable for the value of the shares ascertained at a reasonable date from the death of the testator, which in this case was fixed at six months.—*Held*, that, according to the true construction of his will the testator's gift of £500 to each of his executors in full satisfaction did not preclude charges made by them in their character, also conferred by the will, of administrators of his fidei-commissary inheritance.—It is not the duty of executors to turn the whole estate into money; their duty is to liquidate it, that is reduce it into possession, cleared of debts and outgoings, and so left free for enjoyment by the heirs, and to hold any trust fund separate from their own:—*Held*, that under the bye-laws framed under Act XVII. of 1875 the association governed by that Act is not debarred from administering a testator's assets separate from its own property, and is not empowered (even if bye-laws to that effect would be reasonable) to sell to itself the assets, and to remain accountable only for the price, which by the general law it is incapable of doing; and it is competent for any beneficiary, though interested only to the extent of a life interest in a share, to sue for relief.—*Beningfield* v. *Baxter* (ante, p. 167) approved. Hiddingh's Heirs *v.* De Villiers Denyssen. Hiddingh *v.* Denyssen. Denyssen *v.* Hiddingh - - - - - 624

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—— *Beningfield* v. *Baxter* (12 App. Cas. 167) approved - - - - 624
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—— *Boyes* v. *Cook* (14 Ch. D. 53) approved 263
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—— *Cape Breton Company, In re* (29 Ch. D. 795), affirmed - - - - 652
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—— *Dronfield Silkstone Coal Company, In re* (17 Ch. D. 76), disapproved - - 409
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—— *Dundee Police Commissioners* v. *Straton* (11 Court Sess. Cas. 4th Series, 586) approved - - - - - 184
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—— *Falkland Islands Company* v. *The Queen* (1 Moo. P. C. (N.S.) 312) approved 459
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—— *Fitzherbert* v. *Mather* (1 T. R. 12) commented on - - - - - - 531
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—— *Gladstone* v. *King* (1 M. & S. 35) commented on - - - - - 531
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—— *Glenduror, The* (Law Rep. 3 P. C. 589), approved and followed - - 118
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—— *Globe New Patent Iron and Steel Company, In re* (48 L. J. (Ch.) 295), approved 371
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—— *Hettihewage Siman Appu* v. *Queen's Advocate* (9 App. Cas. 571) considered 643
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—— *Hodgson's School, In re* (3 App. Cas. 869).
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—— *Hopkinson* v. *Rolt* (9 H. L. C. 514) followed - - - - 29
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—— *Hopkinson* v. *Rolt* (9 H. L. C. 514) followed - - - - 53
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—— *Jones* v. *Stanstead Railway Company* (Law Rep. 4 P. C. 98) distinguished - 602
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—— *Killen, In re* (Ir. Law Rep. 15 Ch. 388), reversed - - - - 20
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—— *Mody* v. *Gregson* (Law Rep. 4 Ex. 49) approved - - - - 284
See Sale of Goods. 2.

—— *Moyce* v. *Newington* (4 Q. B. D. 32) overruled - - - - 471
See Sale of Goods. 1.

—— *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (9 Moore's Ind. App. Cas. 87) followed - - - - 101
See Practice—Privy Council. 1.

—— *Native Iron Ore Company, In re* (2 Ch. D. 345), disapproved - - - 371
See Company. 2.

—— *Oxendale* v. *Wetherell* (9 B. & C. 387) approved - - - - 128
See Insurance, Marine. 1.

—— *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. D. 511) commented on - - 531
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—— *St. Giles, Camberwell (Vestry of)* v. *Weller* (Law Rep. 6 Q. B. 168, n.) approved 1
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—— *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) overruled - - 1
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—— *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved - - - - 1
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—— *Stribley* v. *Imperial Marine Insurance Company* (1 Q. B. D. 507) commented on 531
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—— *Sutton Coldfield Grammar School, In re* (7 App. Cas. 91), followed - 444
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—— *Tareenychwm Bonnerjee* v. *Maitland* (11 Moore's Ind. Ap. Cas. 338) followed 101
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—— *Travis* v. *Milne* (9 Hare, 150) approved 167
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—— *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (6 Q. B. D. 51) disapproved
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—— *Woodley* v. *Michell* (11 Q. B. D. 47) overruled - - - - - 503
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—— Malta - - - - - 453, 557
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—— Natal - - - - - 141, 167
See Natal, Law of. 1, 2.
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See New South Wales, Law of.
—— Nova Scotia - - - - - 118
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—— Queensland - - - - - 442
See Queensland, Law of.
COMMENCEMENT DE PREUVE - - 110
See Canada, Law of. 6.

COMPANY—*Bonus Dividend—Capital or Income—Tenant for Life and Remainderman.*] A testator bequeathed his residuary personal estate to his executor T. B. in trust for the testator's wife for her life and after her death to T. B. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends or repairing or maintaining the works. After the testator's death the directors of the company proposed to distribute certain accumulated profits (which had been temporarily capitalised) as a bonus dividend, to allot new shares (partly paid up) to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out, and with T. B.'s consent new shares were allotted to him and registered in his name, the bonus dividend on the testator's old shares being applied in part payment of the new shares:—*Held*, reversing the decision of the Court of Appeal (29 Ch. D. 635), that looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life tenant was not entitled to the bonus or the new shares. Bouch *v.* Sproule - - - - - - 385

2. —— *Mortgage — Registration — Directors — Mortgage to Director not registered — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.] Debentures in a company incorporated under the Companies Act, 1862, were issued to a director of the company. They were not registered in accordance with the requirements of sect. 43 of the Act. The company having gone into liquidation and the validity of these debentures being contested by unsecured creditors, and also by debenture-holders, as to whom it was not shewn that they had made any inquiry as to the charges on the company's property or the existence of a register:—*Held*, reversing the decision of the Court of Appeal, that the mere omission to register, without concealment, did not invalidate the debentures; at all events as between the director and such creditors.—The rule of construction laid down by *In re Native Iron Ore Company* (2 Ch. D. 345) and the decisions prior to it disapproved.—The reasoning of Jessel, M.R., in *In re Globe New Patent Iron and Steel Company* (48 L. J. (Ch.) 295) approved. Wright *v.* Horton [371

3. —— *Shares—Equitable Mortgage—Priority—Deposit of Certificate of Shares—Articles of Association—Lien of Company on Shares for Money due from Shareholders—Notice of Trust—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 30.] The articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association:—*Held*, reversing the decision of the Court of Appeal (31 Ch. D. 19) and restoring the judgment of Field, J. (29 Ch. D. 149), that the company could not in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank claim priority over advances by the bank made after such notice, but that the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514) applied.—*Held*, also, reversing the decision

COMPANY—*continued.*
of the Court of Appeal, that the notice to the company of the deposit with the bank was not a notice of a trust within the meaning of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30, and that the bank by giving notice of the deposit did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders with notice of the interest of the bank. Bradford Banking Company *v.* Beiggs - - - - - - 29

4. —— *Shares—Power of Company to purchase its own Shares—Reduction of Capital—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12, 26—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9–20—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.] A limited company was incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for:—*Held*, reversing the decision of the Court of Appeal, that such a company has no power under the Companies Acts to purchase its own shares, that the purchase was therefore ultra vires, and that the claim must fail.—The reasoning of the Court of Appeal in *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76) disapproved. Trevor *v.* Whitworth - - - - - 409

—— Sale by director to company—Ratification
See Canada, Law of. 2. [589

—— Transfer of shares - - - - 617
See Canada, Law of. 3.

COMPENSATION—Lands Clauses Act—Stamp on conveyance - - - 315
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CONCEALMENT OF MATERIAL FACTS - 531
See Insurance, Marine. 2.

CONTRACT—Ratification—Sale by director to company - - - - - 589
See Canada, Law of. 2.

—— Sale of goods—Fraud - - - 471
See Sale of Goods. 1.

—— Sale of goods—Sample - - - 284
See Sale of Goods. 2.

CONTRIBUTORY NEGLIGENCE—Railway company—Level crossing - - - 41
See Negligence.

CONVERSION—Accumulation of personal estate invested in realty—Lunatic - 672
See Probate Duty.

CONVEYANCE—Consideration—Stamp—Lands Clauses Act - - - - - 315
See Stamps.

CONVICTION—Recovery of property on - 471
See Sale of Goods. 1.

COPYRIGHT—*Lectures in Class-Room by Professor in a Scottish University—Right to restrain Publication.*] A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author.—The appellant, a professor of a Scottish university, delivered lectures in his class-room as part of his ordinary course to students of the university, who were admitted on payment of the prescribed fees:—*Held* (Lord FitzGerald dissenting), that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that the appellant was entitled to restrain other persons from publishing them without his consent. Caird *v.* Sime 326

COVENANT—To pay premium—Valuation 20
See Bankruptcy.

CRIMINAL PROCEEDINGS—Appeal to Privy Council - - - - 459
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CROWN—Right of subject to sue - - 643
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CRUELTY—Evidence—Divorce bill - 362
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DELAY—Sale of shares—Law of Natal - 141
See Natal, Law of. 2.

—— Suit by legatee—Voidable sale - 167
See Natal, Law of. 1.

DIRECTOR—Mortgage - - - 371
See Company. 2.

—— Sale to company - - - 589
See Canada, Law of. 2.

DISCOVERY - - - - - 300
See Practice—Supreme Court. 1.

DISSOLUTION OF MARRIAGE—Divorce bill
See Cases under Practice—Divorce. 1—6.

DIVIDEND—Bonus—Capital or income - 385
See Company. 1.

DIVORCE BILL—Practice - - -
See Cases under Practice—Divorce Court. 1—6.

DOCUMENTS—Production of - - 300
See Practice—Supreme Court. 1.

ENDOWED SCHOOLS ACT (32 & 33 *Vict. c.* 56), *ss.* 5, 9, 11, *and* 19—*Removal of Site—Vested Interests—"Due regard."*] *Held*, that the removal of the site of a school is within the scope of the Endowed Schools Act, 1869, and the powers conferred on the Commissioners by sect. 9;—That an annual sum temporarily applied to the purposes of the school is an endowment within the meaning of sect. 5;—That sect. 19 does not relate to an endowment which has been (whatever its original foundation) subjected to a scheme providing that religious instruction in the liturgy, catechism, and

ENDOWED SCHOOLS ACT—*continued.*
articles of the Church of England shall be given, not to all boys, but to the boys of parents in that communion and the boys of other parents who do not object thereto in writing:—That "due regard" (see *In re Hodgson's School*, 3 App. Cas. 869) had under the circumstances been paid to the educational interests contemplated by sect. 11. —"Entitled," in sect. 11, means legally entitled. —*In re Sutton Coldfield Grammar School* (7 App. Cas. 91) followed.—The interest of a boy on the foundation of a school is not saved or directed to be compensated by the Act of 1869, unless he was there at the date of the passing thereof. *In re* The Free Grammar School and Hospital of Archbishop Holgate at Hemsworth, and the Grammar School at Barnsley - - 444

ESTOPPEL—Res judicata—Action discontinued
See Ship. 6. [256

EVIDENCE—Canadian law - - - 110
See Canada, Law of. 6.

—— Divorce bill - - - - 362
See Practice—Divorce. 4.

EXECUTOR—Duty to convert within six months —Law of Cape of Good Hope - 624
See Cape of Good Hope, Law of.

—— Sale to himself—Law of Natal - 167
See Natal, Law of. 1.

FOREIGN JUDGMENT—Parties—Debtors' trustees—Interest - - - 122
See Jersey, Law of.

GRAMMAR SCHOOL - - - - 444
See Endowed Schools Act.

HIGHWAY—Law of Quebec - - 149
See Canada, Law of. 5.

HONDURAS, LAW OF - - - 160
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HUSBAND AND WIFE—Divorce bill—Practice.
See cases under Practice—Divorce. 1—6.

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See Malta, Law of. 1.

INCOME—Capital—Bonus - - - 385
See Company. 1.

INSURABLE INTEREST - - - 128
See Insurance, Marine. 1.

INSURANCE, LIFE—Policy — Valuation of — Bankruptcy - - - - 20
See Bankruptcy.

INSURANCE, MARINE—"*At and from Port*"—*Cargo—Commencement of Risk—Insurable Interest.*] Where the plaintiffs proposed to insure a wheat cargo "at and from" port, and the defendants, "in accordance with your written request," granted an insurance "from" port:—*Held*, that there was a complete contract to insure "at and from" port.—Where a contract of insurance related to wheat cargo then on board or to be shipped in the D. of S.:—*Held*, that the risk commenced as soon as any portion thereof was on board.—Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors:—*Held*, that such delivery from time to time was a delivery to the purchasers, that it vested in them a right of possession and property, and that, consequently, they had an insurable interest in such wheat as had been so delivered.—*Anderson* v. *Morice* (1 App. Cas. 713) distinguished. —*Oxendale* v. *Wetherell* (9 B. & C. 387) approved. Colonial Insurance Company of New Zealand *v.* Adelaide Marine Insurance Company 128

INSURANCE, MARINE—*continued.*
2. —— *Concealment of Material Facts—Principal and Agent—Concealment by Agent through whom Policy not effected.*] The plaintiffs instructed a broker to re-insure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a re-insurance for £800 through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith:—*Held*, reversing the judgment of the Court of Appeal and restoring the judgment of Day, J. (17 Q. B. D. 553), that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700.—*Fitzherbert* v. *Mather* (1 T. R. 12); *Gladstone* v. *King* (1 M. & S. 35); *Stribley* v. *Imperial Marine Insurance Company* (1 Q. B. D. 507); *Ruggles* v. *General Interest Insurance Company* (4 Mason, 74; 12 Wheaton, 408); and *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. 511) commented on. Blackburn, Low & Co. *v.* Vigors - 531

3. —— "*Perils of the Sea and all other perils*," *&c.—Perils Insured against—Words ejusdem generis—General Words—Donkey-engine, Injury to.*] A steamer was insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear:—*Held*, reversing the decision of the Court of Appeal (17 Q. B. D. 195), that whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the seas," &c., nor under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance."—*West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (6 Q. B. D. 51) disapproved. Thames and Mersey Marine Insurance Company *v.* Hamilton, Fraser, & Co. - - 484

INTEREST—Foreign judgment - - 122
See Jersey, Law of.

INVESTMENT—Liability of trustees - 727
See Trustee.

JERSEY, LAW OF—*Foreign Judgment—Debtor's Trustees cannot be joined as co-Defendants—Practice—Interest on Judgment—Costs.*] A judgment creditor, suing in Jersey to enforce a judgment of an English Court, joined as co-defendants the attorney of his judgment debtor, and the attorney of the trustees of the debtor's property:—*Held*, that the Jersey Court was wrong in decreeing payment personally against the trustees.—The foreign judgment being no more than evidence of a debt, it was incompetent for the plaintiff to sue other persons jointly with the debtor, on the allegation that they held as trustees property of which the debtor was beneficial owner.—As regards interest on the English judgment, it should not be altered by the Jersey Court, except from the date of the Jersey judgment; the costs, moreover, occasioned by joining the trustees should not be given. Hawksford *v.* Giffard - 122

JOINT TENANTS—Scotch law—Lease - 184
See Scotch Law. 1.

JUDGMENT—Foreign—Interest—Parties 122
See Jersey, Law of.

LANDS CLAUSES ACT — Conveyance—Stamp
See Stamps. [315

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See Sale of Goods. 2.

LEASE—Scotch law—Joint tenants—Liability of deceased tenant - - - 184
See Scotch Law. 1.

LEAVE TO APPEAL—Privy Council - 459
See Practice—Privy Council. 3.

LECTURE—Professor in university—Copyright
See Copyright. [326

LEGISLATIVE POWERS—Canada—Province of Quebec - - - - 575
See Canada, Law of. 4.

LEGISLATURE—Colonial—Vacation of seat 442
See Queensland, Law of.

LEVEL CROSSING—Negligence - - 41
See Negligence.

LIEN—Company—Shares—Money due to company - - - - - 29
See Company. 3.

LIMITATION OF LIABILITY - - 256
See Ship. 6.

LUNATIC—*Custody—Order for Reception—Alteration of Order—Order for Discharge—8 & 9 Vict. c. 100, ss. 72, 99—16 & 17 Vict. c. 96, s. 4, Sched. A. No. 1.*] The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind under an order signed by the plaintiff's husband and containing a statement of questions and answers concerning the plaintiff. To the question "Age" the answer was "Fifty." To the question "Whether first attack," the answer was "For the last twenty years has been subject to what is termed hysteria." To the question "Age (if known) on first attack" the answer was "Thirty." To the question "When and where previously under care and treatment" the answer was "During this period of twenty years has been constantly under treatment." A few days after the plaintiff had been received into the asylum the last answer was altered by adding to it the words "For hysteria by" several doctors whose names were given. No copy of the order as so altered was sent to the Commissioners, nor did they sanction the alteration. Afterwards the plaintiff's husband wrote a letter to the defendant begging him to discharge the plaintiff "as soon as you may think it advisable." Notwithstanding this letter the defendant detained the plaintiff for a considerable time. The plaintiff having brought an action against the defendant for maliciously and without reasonable or probable cause assaulting and imprisoning her, the defendant relied upon 8 & 9 Vict. c. 100, ss. 99, 105:—*Held*, affirming the decision of the Court of Appeal (15 Q. B. D. 667), that the answers were a sufficient compliance with the requirements of 16 & 17 Vict. c. 96, s. 4, and Sched. A. No. 1; that the alteration not being of a material part of the order did not invalidate the order; that the letter written by the plaintiff's husband to the defendant was not an order of discharge within the meaning of 8 & 9 Vict. c. 100, s. 72; and that there was no evidence for the jury in support of the plaintiff's case. Lowe *v.* Fox - - - - - 206

—— Accumulation of personal estate invested in realty—Conversion - - - 672
See Probate Duty.

MACHINERY—Accident to - - - 484
See Insurance, Marine. 3.

MALTA, LAW OF—*Legitimation—Children ex nefario coitu—Jurisdiction—Ordinance of* 1814.] By Justinian's Novel 89 legitimation per rescriptum principis was introduced. Children ex nefario coitu though thereby declared incapable were occasionally legitimated by an exercise of Imperial grace.—By the later civil law children of parents free to marry at the time of their conception and birth could be legitimated as a matter of right; children ex nefario coitu only at the discretion of the ruling power and subject to its conditions. — In Malta since it became a British possession the power of legitimation was exercised by the governor until by an Ordinance of the 25th of May, 1814, it passed to the Third Hall of the Civil Court:—*Held*, that the law of Malta as to legitimation is to be found in the Code Rohan and Maltese precedents; and only where its provisions fail, in the civil law.—*Held*, further, that by the Code and precedents the respondent natus ex uxorato et solutâ, and therefore ex nefario coitu, had been duly legitimated by a decree of the Third Hall, and thereby acquired the character and rights of a child legitimus et naturalis so far as permitted by municipal law; entitling him to take under limitations in favour of legitimate and natural children unless a plain intention was expressed to the contrary.—Under the Ordinance of 1814 the Court has jurisdiction in the case of every petition for legitimation which, according to previous practice, would have been referred by the governor to a judge for inquiry and report. Its exercise should be governed by considerations derived from the state of the parent's family and the interests of

MALTA, LAW OF—*continued.*
the child; other persons whose interests may be affected need not be cited, and the Court has no power to attach conditions for their protection. Gera *v.* Ciantar - - - - - 557

2. —— *Trade-mark—Right to exclusive User—Infringement.*] In Malta there is no law or statute establishing the registration of trade-marks, and no authority exists from which an exclusive right to a particular trade-mark can be obtained.—But by the general principles of the commercial law, as soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm.—Where cigarettes made by the appellant's firm became favourably known under the trade-mark "Kaisar-i-Hind," *held* (1) that the use of that trade-mark by others for hats, soap, pickles, &c., could not impede the acquisition of an exclusive right to it as a trade-mark for cigarettes; (2) that the respondents should be restrained from using for cigarettes a copy of the said mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by the appellant's firm. Somerville *v.* Schembri 453

MARKET OVERT—Sale in - - - 471
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MASTER OF SHIP—Liability of—Error in bill of lading - - - - - 698
See Ship. 4.

MAXIM OF LAW—Caveat emptor - - 284
See Sale of Goods. 2.

METROPOLIS MANAGEMENT ACTS—*Sewers, Expense of constructing—Owners of Land abutting on "Street"—"Street"—"New Street"—Metropolis Management Acts*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250; *and* 1862 (25 & 26 *Vict. c.* 102) *ss.* 52, 53, 112.] The words "a street" in sect. 53 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), include "new streets" as defined by sect. 112, as well as old streets.—In 1872 a road in the metropolis which had up to that time been a turnpike road ceased to be a turnpike road and became a common highway. In 1883 the vestry of the parish in which the road was constructed a sewer and apportioned part of the expense of construction to the owner of lands abutting on the road. Previously to 1883 there had been no sewer in this part of the road. Sewers' rates had been levied for five years prior to the 1st of January, 1856, in respect of these lands:—*Held*, affirming the decision of the Court of Appeal (16 Q. B. D. 475), that the case fell under sect. 53 and not under sect. 52 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102); that the road was a "street" within the meaning of sect. 53 as defined by sect. 112 of that Act, and that the lands were under the proviso in sect. 53 exempt from apportionment.—*Vestry of St. Giles, Camberwell* v. *Weller* (Law Rep. 6 Q. B. 168, n.) and *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved. *Sawyer* v. *Paddington Vestry* (Law Rep. 6 Q. B. 164) overruled. Vestry of St. John, Hampstead *v.* Cotton - - - - - - 1

MISTAKE—Arbitrator—Revocation of submission - - - - - 738
See Arbitration.

—— Bill of lading—Liability of master - 698
See Ship. 4.

MORA—Law of Natal - - - - 141
See Natal, Law of. 2.

MORTGAGE—Brickfields—Valuation of houses—Liability of trustees - - 727
See Trustee.

—— Company—Registration - - 371
See Company. 2.

—— Priority—Shares—Money due to company
See Company. 3. [29

NATAL, LAW OF—*Duties of Executor—Sale by Executor to himself voidable—Suit by Legatee—Rights of Creditors—Delay.*] B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s executor purchased the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee:—*Held*, in a suit by the widow against the executor, that such sale was voidable by the rules of equity as recognised by the law of Natal; and that a decree be made for a general administration of B.'s estate declaring that the sale be set aside with certain special directions.—*Travis* v. *Milne* (9 Hare, 150) approved.—Suit held in this case not to be barred by delay or acceptance of money on the ground either of ratification, acquiescence, or laches.—Decree to be without prejudice to its being shewn on taking the accounts that any creditor was disentitled to the benefit thereof, by estoppel or otherwise. Beningfield *v.* Baxter - 167

2. —— *Mora—Sale of Shares—Unreasonable Delay in Delivery.*] Where a contract for the sale of shares did not fix the time for the delivery of them:—*Held*, that the time for delivery could not depend upon circumstances which were unknown to the buyer, and that delay in tendering the shares arising from the seller having sent his certificate to England for subdivision, as this circumstance was unknown to the buyer, was unreasonable and justified the buyer in refusing to accept the shares. Such delay was mora, assuming the law of mora to be applicable. De Waal *v.* Adler - - - - 141

NEGLIGENCE—*Railway Company—Level Crossing—Contributory Negligence—Onus of Proof with regard to Contributory Negligence.*] A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.—The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.—An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff:—*Held*, affirming the

NEGLIGENCE—*continued.*
decision of the Court of Appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident: that there was therefore no case to go to the jury and that the railway company were not liable.—Observations as to the onus of proof with regard to contributory negligence. Wakelin *v.* London and South Western Railway Company - - - - 41

NEW SOUTH WALES, LAW OF—39 *Vict. No.* 38 —*Liability of the Government to be sued in Tort.*] Under New South Wales Act 39 Vict. No. 38, the Government of the Colony is liable to be sued in an action of tort.—*Hettihewage Siman Appu* v. *The Queen's Advocate* (9 App. Cas. 571) relates exclusively to the law of Ceylon, and does not lay down as a universal principle that actions ex delicto cannot be brought against the Crown. Farnell *v.* Bowman - - - 643

NEW STREET—Construction of sewers - 1
See Metropolis Management Acts.

NEW TRIAL—Order for—Appeal—Jurisdiction of Court of Appeal - - - 746
See Practice—Supreme Court. 2.

NOTICE—Assignment by debtor—Further advance by mortgagee - - - 53
See Scotch Law. 2.

NOVA SCOTIA—Law of—Salvage - 118
See Ship. 7.

ORDER—Reception and discharge of lunatic 206
See Lunatic.

PART PERFORMANCE—Quasi contract - 110
See Canada, Law of. 6.

PARTNERSHIP — *Winding-up — Accretion to Capital of the Partners—Distribution of Surplus Assets—Lien.*] Where in keeping their accounts partners had treated their respective shares of the declared or estimated profits of each year as accretions to their respective capitals:—*Held*, that the profits of the year ending with the dissolution of the firm could not be so treated.—*Held*, further, that the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution. The residue or deficiency will be profits or losses, in either case divisible in the agreed proportions. The rateable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up a deficiency, and to the claim of any of the partners against the entire assets to answer it. Binney *v.* Mutrie - - - 160

PATENT—*Chemical Process.*] A patent for producing colouring matters for dyeing and printing by a chemical process held valid.—The decision of the Court of Appeal (29 Ch. D. 366) reversed. —The decision of Pearson, J. (24 Ch. D. 156) restored. Badische Anilin und Soda Fabrik *v.* Levinstein - - - - - 710

2. —— *Petition for Prolongation—Rule* 9—*Accounts.*] Petition for prolongation dismissed on the ground that proper accounts had not been produced to shew the remuneration of the

PATENT—*continued.*
patentee.—Rule 9 not having been complied with, a postponement to amend the accounts filed was refused. *In re* Yates & Kellett's Patent 147

PERILS OF THE SEA—Bill of lading 503, 518
See Ship. 2, 3.

—— Marine insurance - - - 484
See Insurance, Marine. 3.

POLICY—Life insurance—Valuation - 20
See Bankruptcy.

POSSESSION—Beneficial—Scotch law - 544
See Scotch Law. 3.

POWER—*Power created after Will—Appointment by General Bequest—Contrary Intention*—1 *Vict. c.* 26, *ss.* 23, 24, 27.] A testatrix, who had a general power of appointment over the A. property, by her will in 1854 after specific devises and bequests devised and bequeathed the residue of her estate to X. By a deed-poll in 1855 she appointed the A. property upon such trusts as she by deed or her last will "should from time to time or at any time thereafter direct or appoint," and in default of appointment upon trust for Y. The testatrix died in 1857:—*Held*, affirming the decision of the Court of Appeal, that reading together sects. 24 and 27 of the Wills Act 1837 (1 Vict. c. 26), the will operated as an exercise of the power given or reserved by the subsequent deed-poll and passed the property to X.—*Boyes* v. *Cook* (14 Ch. D. 53) approved.—*Semble*, that the case also fell within sect. 23 of the Wills Act, and with the same result. Airey *v.* Bower [263

PRACTICE—DIVORCE—*Divorce Bill—Alimony —Allowance for Wife's Defence.*] Where upon a bill for divorce by the husband it appears that the wife has no means to defend herself, the House will order the husband to pay her a small sum in order that she may make her defence. A.'s Divorce Bill - - - - 365

2. —— *Divorce Bill—Alimony—Adultery— Alleged Nullity—Impotence.*] Where, on a bill of divorce by the husband on the ground of the wife's adultery the adultery was proved, but it appeared that the husband had not fulfilled his duty by providing a home for the wife when she was separated from him by order of his medical attendant, the House in passing the bill directed that a clause should be added making provision for the wife. A.'s Divorce Bill - - 366

3. —— *Divorce Bill—Bastardising Clause.*] A paragraph in a divorce bill contained allegations tending to bastardise a child to which the wife had given birth during the marriage. There was access at the natural period of the conception of the child:—*Held*, that such paragraph was inadmissible, and must be struck out of the bill. Hewat's Divorce Bill - - - - 312

4. —— *Divorce Bill—Evidence—Cruelty— Adultery.*] Acts which would if done in England be held by the High Court of Justice to constitute legal cruelty, will also be held to constitute legal cruelty in Divorce Bills. Gifford's Divorce Bill - - - - - 362

5. —— *Divorce Bill—Second Reading—Substituted Service.*] In proceedings upon a divorce bill application was made in May, 1886, to dis-

PRACTICE—DIVORCE—*continued.*
pense with personal service on the respondent on the ground that his address was unknown to the petitioner, that a solicitor who had previously acted for the respondent had admitted that he knew of his address but had refused to divulge it and that the respondent had been last heard of in February, 1886, being then at Montreal, in Canada:—*Held*, that the application was premature, and must be refused. Gifford's Divorce Bill - - - - - - - 361

6. —— *Divorce Bill—Second Reading—Substituted Service.*] Where on a bill for divorce it appeared that the respondent's address was concealed, and the House ordered substituted service, service was ordered to be made on the respondent's solicitor, on the respondent's parent, and also on the person with whom the respondent appeared to be residing. A.'s Divorce Bill - 364

PRACTICE—PRIVY COUNCIL—*Concurrent Findings of Facts.*] Where there have been concurrent findings of fact by the Courts below, the question in appeal is not what conclusion their Lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong.—*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (9 Moore's Ind. Ap. Ca. 87), and *Tareenychurn Bonnerjee* v. *Maitland* (11 Moore's Ind. Ap. Ca. 338) followed. Allen *v.* Quebec Warehouse Company - - 101

2. —— *Consolidation of Appeals.*] Their Lordships will consolidate appeals at any stage if it appears convenient that they should be heard together. An appeal was struck out of the board and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted. Hiddingh *v.* Denyssen - - - - - 107

3. —— *Criminal Proceedings—Conviction set aside — Order striking off the Roll reversed — Grounds for granting special Leave to appeal.*] In an appeal by a barrister and solicitor against a verdict convicting him of perjury, and against a consequential order of Court directing him to be struck off the roll of practitioners:—*Held*, that the conviction having been obtained by directions of the judge which were improper and grievously unjust to the appellant, could not be allowed to stand, and that the consequential order must be reversed.—Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.—*Falkland Islands Company* v. *The Queen* (1 Moore P. C. (N.S.) 312) approved.—Special leave was granted to appeal against the conviction, limited to shew that being the sole foundation for the subsequent order, it had been obtained so unfairly as not to be conclusive for that purpose. *In re* Dillet (Abraham Mallory) - 459

PRACTICE—SUPREME COURT—*Action for Recovery of Land—Discovery—Title Deeds—Purchaser for Value without Notice—Privilege—Practice—Judicature Act* 1873 (36 & 37 *Vict. c.* 66) *s.* 24 *sub-s.* 2.] An action having been brought in the Chancery Division to recover possession of land and claiming production and delivery of documents alleged to be material to the plaintiff's title, the defendants pleaded that they were purchasers for valuable consideration without notice, and on this ground objected to the discovery and production of certain documents of title:—*Held*, affirming the decision of the Court of Appeal (33 Ch. D. 323), that the objection was invalid for the following reason:—Before the Judicature Act 1873 a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles. Sect. 24 sub-sect. 2 of the Act of 1873, therefore, gives no protection to the defendants, the Court having now complete jurisdiction over the whole action. Ind, Coope & Co. *v.* Emmerson - 300

2. —— *Appeal — New Trial — Jurisdiction of Court of Appeal to reverse a verdict—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 4.] *Quære*, whether on an appeal from an order of a Divisional Court upon an application for a new trial, on the ground of the verdict being against evidence, the Court of Appeal has power under Order LVIII., rule 4, to give judgment for the party against whom a verdict and judgment have been given, instead of directing a new trial.—The decision of the Court of Appeal (17 Q. B. D. 603) upon this point doubted. Toulmin *v.* Millar [746

PRESCRIPTION—Scotch law - - 544
See Scotch Law. 3.

PRINCIPAL AND AGENT—*Contract with Agent for Undisclosed Principal—Set-off against Principal of Debt due from Agent—Estoppel.*] Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account.—L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew that L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief on the subject whether they made this contract on their own account or for a principal:—*Held*, affirming the decision of the Court of Appeal, that C. could not in an action brought by the principal for the price of the cotton set off a debt due from L. & Co. Cooke *v.* Eshelby - 271

2. —— *Sale of Agent's own Property to Principal — Non-disclosure of Interest — Company — Director—Misfeasance or Breach of Trust—Contributory—Companies Act* 1862 (25 & 26 *Vict. c.* 89) *s.* 165.] A director of a company as the company's agent purchased for the company a property in which, before he became director, he had acquired an interest. The company having gone into liquidation a shareholder whose shares were fully paid up took out a summons as a contributory, under sect. 165 of the Companies Act, 1862, and sought to make the director liable for misfeasance or breach of trust on the ground that

PRINCIPAL AND AGENT—*continued.*
the director had allowed the company to make the purchase without disclosing his own interest, and at a price far exceeding the value:—*Held*, that the application must be dismissed, the evidence adduced by the applicant failing to shew either that the director had not disclosed his interest or that the purchase price was above the value.—The decision of Pearson J. (*In re Cape Breton Company*, 26 Ch. D. 221) and of the Court of Appeal (29 Ch. D. 795) affirmed on the ground above stated.—*Semble*, that such a contributory cannot take out a summons under sect. 165 unless he shews that the breach of duty has resulted in loss to the assets of the company and that he has a direct pecuniary interest in the success of the application. Cavendish Bentinck *v.* Fenn 652

—— Knowledge of agent—Concealment - 531
See Insurance, Marine. 2.

—— Ship's broker—Authority of - - 698
See Ship. 4.

PRIVILEGE—Production of documents - 300
See Practice—Supreme Court. 1.

PRIVY COUNCIL—Practice - 101, 107, 459
See Practice—Privy Council. 1, 2, 3.

PROBATE DUTY—*Lunatic—Accumulation of Personal Estate—Investment of Personalty in Realty—Conversion.*] Money of a lunatic was invested by his committees, by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands, which under their Lordships' direction, were conveyed to the committees, "their heirs and assigns, upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the lands so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and re-investment which were contained in the deed) should "to all intents and purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered:—*Held*, reversing the decision of the Court of Appeal (16 Q. B. D. 408) and restoring the decision of Mathew and Smith, JJ. (14 Q. B. D. 895), that the value of the lands was part of the personal estate of the lunatic at his death and liable to probate duty. Attorney-General *v.* Marquis of Ailesbury - - - 672

PRODUCTION OF DOCUMENTS - - 300
See Practice—Supreme Court. 1.

PROFIT—Made by agent - - - 652
See Principal and Agent. 2.

PROLONGATION OF PATENT - - 147
See Patent. 2.

PROPERTY IN GOODS—Sale induced by false pretences - - - - 471
See Sale of Goods. 1.

QUEBEC, LAW OF - - 110, 149, 575, 617
See Canada, Law of. 3, 4, 5, 6.

QUEENSLAND, LAW OF—*Queensland Constitution Act of* 1867, *sects.* 23 *and* 24—*Construction—Seat in Council vacated.*] Where a statute provided that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant;" and a councillor absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time in the event covered the whole of the first and part of the second session:—*Held*, that his seat was vacated. The permission did not cover two successive sessions. Attorney-General of Queensland *v.* Gibbon - - - 442

RAILWAY COMPANY—*Carrier—Alternative Rates—Just and reasonable Conditions—Railway and Canal Traffic Act* 1854 (17 & 18 *Vict. c.* 31) *s.* 7.] Cattle were carried by a railway company under a special contract signed by the consignor which stated that the company had two rates for the conveyance of cattle; one the ordinary rate when they took the ordinary liability of the carrier; the other a reduced rate; that these cattle were to be carried at the reduced rate, the company to be relieved from all liability in case of damage or delay, except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants. A notice was posted up in the company's office which stated that the company had two rates, namely the owner's risk rate upon the terms above given, and the company's risk rate, which was ten per cent. above the owner's risk rate, at which the company undertook the ordinary risk of carriers in respect of rail transit, limited for neat cattle to £15, for pigs and sheep to £2, but did "not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The consignor had never seen any rate but the owner's risk rate. After two trials cattle had ceased to go at the higher rate. The higher rate was less than the maximum allowed by the company's Acts. No list of rates was exhibited.—The cattle having been injured through the negligence (but not the wilful misconduct) of the company's servants:—*Held*, that the notice of the higher rate was not invalidated by the limitation as to value, nor by the fact that it did not mention the terms upon which cattle could be carried without limitation of value as provided by the Railway and Canal Traffic Act 1854 s. 7; that the clause as to not admitting liability meant only that the liability must be established by proof; that so construed the condition was just and reasonable within s. 7; that the consignor might have known and must be taken to have known the terms of the higher rate, and had the offer of a just and reasonable alternative; and that the company were therefore protected by the special contract.—The decision of the Irish Court of Appeal (L. R. Ir. 18 Q. B. D. 1) reversed. Great Western Railway Company *v.* McCarthy - - - 218

—— Canada—Order of railway committee 602
See Canada, Law of. 1.

—— Negligence—Level crossing - - 41
See Negligence.

RATIFICATION—Sale by director to company
See Canada, Law of. 2. [589

REDUCTION OF CAPITAL - - - 409
See Company. 4.

REGISTRATION—Mortgage—Company - 371
See Company. 2.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA - - - 247
See Ship. 5.

RES JUDICATA—Action discontinued - 256
See Ship. 6.

RESTITUTION—Order for - - - 471
See Sale of Goods. 1.

REVOCATION—Submission to arbitration 738
See Arbitration.

RISK—Commencement of - - - 128
See Insurance, Marine. 1.

RULES OF BUILDING SOCIETY—Validity 197
See Building Society.

RULES OF SUPREME COURT, 1883, Order LVIII., r. 4 - - - - 746
See Practice—Supreme Court. 2.

SALE—Agent's property sold to principal 652
See Principal and Agent. 2.

SALE OF GOODS—*Contract induced by False Pretences—Revesting of Property in Original Owner upon Conviction—Sale in Market Overt—Purchaser in Market Overt without Notice of Fraud—Order for Restitution—24 & 25 Vict. c. 96, s. 100.*] The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—*Held*, affirming the decision of the Court of Appeal (18 Q. B. D. 322), that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser.—*Moyce* v. *Newington* (4 Q. B. D. 32) overruled. Bentley *v.* Vilmont - - - - - 471

2. —— *Contract to manufacture Goods equal to Sample—Sale of Goods by Sample—Caveat emptor—Warranty of Merchantableness implied—Latent Defect.*] Cloth merchants ordered of cloth manufacturers worsted coatings which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent and was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of cloths of that class:—*Held*, affirming the decision of the Court of Appeal, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used.—*Mody* v. *Gregson* (Law Rep. 4 Ex. 49) approved. Drummond *v.* Van Ingen - - - - - - 284

SALVAGE - - - - - 118
See Ship. 7.

PLSAME—Sale by - - - - 284
See Sale of Goods. 2.

SCOTCH LAW—*Lease—Joint Tenants—Covenant to pay Rent—Liability of Executors of deceased Tenant during Sole Tenancy of Survivor.*] A mineral lease for thirty-one years was granted to L. and M., "and the survivor of them, but expressly excluding assigns and sub-tenants, whether legal or conventional." By the lease L. and M. bound themselves and their respective heirs, executors and successors, all conjunctly and severally renouncing the benefit of discussion, to pay the rent. The lease also provided that if L. or M. became bankrupt it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bankrupt, and M. died, but the lessor never exercised his option to determine the lease:—*Held*, reversing the decision of the Court of Session, that by the terms of the clause of obligation the lessees were conjunctly and severally liable for rent irrespective of their interest, and that after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease.—*Dundee Police Commissioners* v. *Straton* (11 Court Sess. Cas. 4th Series, 586) approved. Burns *v.* Bryan or Martin - - 184

2. —— *Mortgagees—Right in Security—Disposition ex facie absolute—Security for past and future Advances—Notice of Assignation by Debtor of all Reversionary Interest—Further Advances after Notice.*] A disponee who holds property on an ex facie absolute title of ownership, but in security only of advances made and to be made to the disponer, is not entitled to hold the property for repayment of advances made after he has received notice that the disponer has, for a valuable consideration, conveyed his reversionary right in the property to another:—So *held*, reversing the decision of the Court of Session, following the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514). Union Bank of Scotland *v.* National Bank of Scotland - - - - - 53

3. —— *Sea-shore—Crown Property—Bounding Charter—"With pertinents"—Prescriptive Title—Beneficial Possession—Acts of Ownership—Drift Sea-ware—Act of* 1617, *c.* 12, *and* 37 *&* 38 *Vict. c.* 94, *s.* 34.] The pursuer brought an action to establish his title as against the defenders and the Crown to the foreshore of the sea ex adverso land of which he was the proprietor. He claimed under a grant of feu made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to shew that the grantor had an express title from the Crown. He, however, endeavoured to establish his right to the foreshore by prescriptive possession following on his own title, and, inter alia, adduced evidence to shew that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he and his predecessors had taken stone and sand from the shore; and that they and their tenants had exclusively carted away the drift sea-ware. The Crown on the other hand adduced evidence to shew that stones and sand were taken from the shore to build a harbour, and that the villagers had carried away in

SCOTCH LAW—*continued.*
creels drift sea-ware:—*Held*, affirming the decision of the Court of Session, that, notwithstanding the absence of an express title in the superior, the pursuer had given sufficient proof that he and his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617, c. 12, and the Act of 37 & 38 Vict. c. 94, by virtue of their heritable infeftments, and that he had consequently a valid right of property in the solum of the foreshore as against the Crown. Lord Advocate *v.* Young. North British Railway Company *v.* Young - - - - 544

—— Copyright—Lecture—Scotch University 326
See Copyright.

SEA-SHORE—Scotch law - - - 544
See Scotch Law. 3.

SECURED CREDITOR—Bankruptcy - - 20
See Bankruptcy.

SECURITY—Past and future advances—Scotch law - - - - - - 53
See Scotch Law. 2.

SERVICE—Divorce bill - - 361, 364
See Practice—Divorce. 5, 6.

SET-OFF—Principal and agent - - 271
See Principal and Agent. 1.

SEWER—Construction of—New street - 1
See Metropolis Management Acts.

SHARES—Mortgage—Money due to company 29
See Company. 3.

—— Purchase of by company - - - 409
See Company. 4.

—— Sale of—Delay - - - - - 141
See Natal, Law of. 2.

SHIP—*Bill of Lading—Deck Cargo—Jettison of Deck Cargo—Liability of Shipowner to Shipper for Deck Cargo jettisoned—Contract, Breach of—Damage—Proximate Cause of Damage.*] On a ship carrying a general cargo from New Orleans to Liverpool cotton was shipped on deck, under a practice by which owners of vessels trading between those ports were in the habit of stowing goods on deck in violation of their contract with the shipper, the shipowners accepting full responsibility for the consequences. The bills of lading for part of the cotton contained the words "under deck." All the bills of lading contained exceptions (inter alia) in favour of "jettison." On the voyage the ship took ground, and in order to get her off the master properly jettisoned the cotton. The indorsees of the bills of lading having brought an action against the shipowners to recover the value of the cotton:—*Held*, affirming the decision of the Court of Appeal, that (whether the bills of lading did or did not contain the words "under deck") the cotton was carried in breach of the contract and was not within the exceptions specified in the bills of lading, which had exclusive reference to goods safely stowed under hatches; that the shipowners had therefore no legal excuse for their failure to deliver; that the cause of damage was not too remote, and that the shipowners were liable to the indorsees for the value of the cotton. Royal Exchange Shipping Company *v.* Dixon - - - - - - - 11

SHIP—*continued.*

2. —— *Bill of Lading — Charterparty — "Perils of the seas"—"Dangers and accidents of the seas"—Damage caused by Sea-water through Hole eaten by Rats.*] Rice was shipped under a charterparty and bills of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants;—*Held*, reversing the decision of the Court of Appeal (17 Q. B. D. 670) and restoring the decision of Lopes, L.J. (16 Q. B. D. 629), that the damage was within the exception and that the shipowners were not liable. Hamilton, Fraser & Co. *v.* Pandorf & Co. - - - - - - 518

3. —— *Bill of Lading—Collision—Perils of the Sea—Negligence.*] Foundering caused by collision with another vessel is within the exception "dangers and accidents of the sea" in a bill of lading: and excuses the shipowner for non-delivery of the goods if it occurs without fault in the carrying ship:—So *held*, reversing the decision of the Court of Appeal (11 P. D. 170).—*Woodley* v. *Michell* (11 Q. B. D. 47) overruled. Wilson, Sons & Co. *v.* Owners of Cargo per the "Xantho." The "Xantho" - - - 503

4. —— *Bill of Lading—Liability of Master for Error in Date in Bill of Lading—Ship's Brokers—Authority of Broker.*] The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is carried does not give them implied power to relieve the master, when he signs bills of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bills. For breach of that duty the master is liable to his owners. Stumore, Weston & Co. *v.* Breen - - - - - 698

5. —— *Collision — Liability for infringing Regulations—Sailing Rules, Arts.* 14, 22—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] A ship failing to obey one of the Regulations for preventing collisions whereby a collision occurs is not to be deemed to be in fault within the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, if the circumstances were such that a competent seaman exercising reasonable care could not have discovered that the regulation was in fact applicable.—Of two sailing ships approaching one another the S. was running free and the T. was close-hauled on the port tack. It was therefore the duty of the T. to keep her course in accordance with arts. 14, 22 of the Regulations for preventing collisions at sea (1884), but those navigating the T., in the belief that the S. was close-hauled on the starboard tack, ported, whereby a collision occurred:—*Held*, affirming the decision of the Court of Appeal, that since with ordinary skill and by the exercise of reasonable care those navigating the T. could not have ascertained that the S. was running free, the T. was not to be deemed to be in fault within the Merchant Shipping Acts, 1873 (36 & 37 Vict. c. 85), s. 17. Baker *v.* Owners of the "Theodore H. Rand." The "Theodore H. Rand." - - - 247

6. —— *Limitation of Liability — Claim against Fund in Court — Discontinuance—Es-*

SHIP—*continued.*

toppel—Res Judicata—Res inter alios acta.] An action having been brought by the owners of ship K. against the ship A. for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," and an order in those terms was drawn up in the Admiralty Registry. The owners of the cargo of ship K. having afterwards brought an action against the owners of ship A. for damages arising out of the same collision, both ships were held to blame, and the cargo owners were held entitled to half their damages. The owners of ship A. having obtained a decree limiting their liability and having paid a sum into Court, the cargo owners filed their claim in the limitation action. The owners of ship K. having afterwards with the consent of the owners of ship A. obtained a rescission of the order for this discontinuance, claimed against the fund in the limitation action. The cargo owners having objected to this claim:—*Held*, affirming the decision of the Court of Appeal (11 P. D. 40), that the agreement and order for discontinuance (upon their true construction) did not amount to a release of all claims, and that the owners of ship K. were not precluded from claiming against the fund.—*The Bellcairn* (10 P. D. 161) distinguished. Owners of Cargo of the "Kronprinz" *v.* Owners of the "Kronprinz." The "Ardandhu" - - **256**

7. —— *Salvage—Quantum to Salvors—Reduction.*] Case in which salvage remuneration was reduced from $12,000 to $7500; their Lordships being of opinion that the difference between the sum awarded and that which would be liberal was so large as to require correction.—*The Glenduror* (Law Rep. 3 P. C. 589) approved and followed. Owners of the "Thomas Allen" *v.* Gow. The "Thomas Allen" - - **118**

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SOLICITOR—Striking off rolls—British Honduras - - - - **459**
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STAMP—*Ad valorem duty—Stamp Act*, 1870, *Schedule and s.* 70—*Conveyance on Sale—Compulsory Sale under Lands Clauses Consolidation (Scotland) Act*, 1845 (8 *&* 9 *Vict. c.* 19)—*Compensation for Loss of Trade.*] The schedule of the Stamp Act of 1870 (33 & 34 Vict. c. 97) prescribes an ad valorem duty on every "conveyance or transfer on sale of any property." By sect. 70 the term "conveyance on sale" includes every instrument whereby any property upon the sale thereof is transferred to or vested in the purchaser.—By deed of conveyance S. & Co. conveyed business premises to a railway company. The deed stated that the jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, had found that S. & Co. were entitled to £28,586 2*s.* 1*d.* as the value of the premises which had been taken by the company under the powers of their special Act; £14,572 16*s.* 3*d.* for the value of the buildings, &c., upon the premises, and £9499 8*s.* 3*d.* as compensation for loss of

STAMP—*continued.*

business, and that the company had paid the three sums so assessed to S. & Co.:—*Held*, reversing the decision of the Court of Session, that the £9499 8*s.* 3*d.* allowed by the jury as compensation for loss of business was part of the "consideration for the sale" of the premises, and liable to ad valorem duty accordingly. Commissioners of Inland Revenue *v.* Glasgow and South-Western Railway Company - - **315**

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